CRIMINAL JURISDICTION OVER VISITING NAVAL FORCES

by

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United States Navy

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CRIMINAL JURISDICTION OVER
VISITING NAVAL FORCES

A Thesis

Presented To

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by

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SCOPE

A study of the respective rights under international law of visiting and territorial States to exercise their exclusive and concurrent jurisdiction over crimes committed on board visiting warships or committed by a visiting warship's officers or crew while ashore. Particular emphasis is given to determine which State has the primary right to exercise its concurrent jurisdiction over 25 hypothetical criminal cases which may arise while a warship is visiting within the territorial waters of a State with which its flag-State has no status of forces-type agreement.

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CHAPTER I

INTRODUCTION

A serious crime committed on board a warship visiting in foreign waters or by one of its crew while ashore on duty or leave often results in an unhappy international incident for the visiting naval commander, perplexing legal questions for his non-lawyer "legal officer," unwelcome diplomatic business for the flag-State's consul, and political embarrassment for the territorial State's officials who consented to the warship's visit. Complicating their problems is the fact that such an incident often provides copy for front page news stories in the national press, general conversation for the local public, and powerful ammunition for those who desire such visits to end.

The existence of a status of forces agreement, such as that which has long existed between the United States and the Republic of the Philippines,[1] does not necessarily resolve their problems. Recently, for example, the *entire* first two pages of the *Philippine Free Press*, a national newspaper founded in 1908, were devoted to such an

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[1] Agreement With the Republic of the Philippines Concerning Military Bases, March 14, 1947, 61 Stat. (4) 4019, T.I.A.S. No. 1775.

incident, including a full page article headlined "KILLINGS AT U.S. MILITARY BASES"[2] and a large picture of visiting American warships captioned "U.S. WARSHIPS AT SUBIC BAY -- Extraterritorial rights" and of the American ambassador captioned "AMBASSADOR BLAIR -- Could be overruled."[3] On the other hand, where there is no such agreement setting forth the jurisdiction of the visiting and territorial States over such a crime, the incident is potentially even more explosive for all concerned because of the lack of clearly defined jurisdictional rules under international law. As to shipboard crimes, for example, Mr. Justice Stones' observation concerning the jurisdictional rules governing visiting merchant ships is even more true with regard to visiting warships:

> There is not entire agreement among nations or the writers on international law as to which sovereignty should yield to the other when the jurisdiction is asserted by both.[4]

And concerning the jurisdictional rules governing visiting naval forces ashore, Mr. Colombos states, with typical

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[2] Rama, *Killings At U.S. Military Bases -- Two Filipino "Intruders" Were Shot Dead By U.S. Military Guards. American Authorities Have No Duty To Give Special Protection To Those Who Do Their Country A Disservice.* Philippine Free Press, Dec. 26, 1964, p. 2.

[3] Philippine Free Press, Dec. 26, 1964, p. 2.

[4] United States v. Flores, 289 U.S. 137, 158 (1933).

English restraint, "The position of officers and crew when ashore is not quite free from doubt."[5]

Those charged with negotiating a timely, legal, equitable, and practical solution following such an incident usually come to the bargaining table fully "equipped" with inadequate time, conflicting legal authorities, unresolved questions of fact, pressures from their superiors to come up with a "good solution as soon as possible," and a not unreasonable fear that, upon review, their appraisal of the problem and their ultimate solution will be found wanting by those who with the benefit of rectrospect have a fuller knowledge of the facts and a clearer understanding of the law involved.

A case in point. In 1911, a United States Navy sailor while ashore in Japan, murdered a fellow sailor. There then being no status of forces agreement as there fortunately is today,[6] the local authorities jailed the culprit and prepared to prosecute him before a Japanese criminal court. American Ambassador O'Brien, probably without the benefit of a lawyer or anyone else on his

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[5] COLOMBOS, INTERNATIONAL LAW OF THE SEA § 289, at 251 (5th ed. 1962) [hereafter cited as COLOMBOS].

[6] Administrative Agreement With Japan, Jan. 19, 1960, 11 U.S.T. & O.I.A. 1652, T.I.A.S. No. 4510.

staff who had a good understanding of the rules of jurisdiction prescribed by international law, apparently had called to his attention two 1910 cases which took place in Gravesend, England, and Cherbourg, France, wherein the local authorities had turned over two errant sailors to the United States Navy for disciplinary action. The Ambassador, therefore, informally requested the Japanese Foreign Office to allow the United States to take jurisdiction over the case but his request was denied. He then cabled to the State Department for instructions, mentioning the Gravesend and Cherbourg cases. Mr. Hackworth, former Legal Adviser for the State Department, records that Secretary of State Knox cabled the Ambassador that the United States had obtained custody of the Gravesend and Cherbourg offenders only "by courtesy of France and Great Britain"[7] and that

> Unless the practice of other nations is contrary, you should concede jurisdiction to Japan, at the same time indicating that this Government would prefer by courtesy to try the prisoner.[8]

Hackworth does not record what Ambassador O'Brien was able to determine regarding "the practice of other nations"

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[7] II HACKWORTH, INTERNATIONAL LAW 422 (Department of State Pub. No. 1521, 1941) [hereafter cited as HACKWORTH].

[8] *Ibid.*

but does record that the sailor "was later tried and convicted by the Japanese court,"[9] a result which -- in view of the facts stated -- does not appear correct under the applicable rule of jurisdiction prescribed by international law.

Having in mind the possible international conflicts of jurisdiction which may confront a visiting naval commander and his legal officer in the absence of an applicable status of forces-type agreement, the purpose of this study is to develop, define, and illustrate the current rules of jurisdiction prescribed by international law for the disposition of crimes committed on board visiting warships and by visiting naval forces ashore.

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[9] *Ibid.*

CHAPTER II

FUNDAMENTALS OF CRIMINAL JURISDICTION

A. CRIMINAL JURISDICTION OF STATE COURTS UNDER MUNICIPAL LAW.

Each State in the international community generally establishes a number of different courts "to handle a part of . . . [its] judicial business."[1] At least one of these courts is invested with the power to try accused persons and charges of crime. Usually, however, the State's criminal "judicial business" is divided up among several types of courts (e.g., civil and military courts). When one of these courts has been legally invested with the power to try both the accused person and the charge of crime before it, such court is said to have "jurisdiction."[2]

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[1] JESSUP, TERRITORIAL WATERS AND MARITIME JURISDICTION 135 (1927).

[2] *E.g.*, "The jurisdiction of a court-martial -- its power to try and determine a case -- and hence the validity of each of its judgments, is conditioned upon these *indispensable requisites*: That the court was appointed by an official empowered to appoint it; that the membership of the court was in accordance with the law with respect to number and competency to sit on the court; and that the *court was invested by act of Congress with power to try the person and the offense charged.*" Manual for Courts-Martial, United States, 1951, para. 8 [hereafter cited as MCM, 1951]. (Emphasis added.)

In re Gilbert[3] illustrates attempted criminal prosecutions before two Brazilian courts in which each court ruled it lacked the required jurisdiction. In 1944 Gilbert, a United States marine, while on guard duty at the entrance to Admiral Ingram Camp in Recife, shot and killed a Brazilian national who was attempting to enter the camp to obtain payment of a bill owed him by another marine. The camp was a part of the American military based temporarily established in northern Brazil during World War II. Unfortunately no status of forces agreement had ever been entered into between Brazil and the United States. The local police authorities first sought to prosecute Gilbert before the Third Criminal District Court of Recife, a *civil* court, but the court "declared itself to be without jurisdiction owing to the military nature of the crime."[4] Gilbert was then brought before the Military Judge of the Seventh Military Region but the judge

> declined jurisdiction on the ground that under Brazilian law both offender and victim were civilians and that the crime occurred without the camp although "within the sphere of supervision and guardianship of the marine Gilbert".[5]

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[3] "Supreme Federal Court, Nov. 22, 1944, DIARIO DA JUSTICA, Aug. 21, 1945, 8 Jurisprudencia 2969 (No. 190), [1946] Ann. Dig. 86 (No. 37) (Braz.).

[4] [1946] Ann. Dig. at 86. [5] *Ibid.*

In view of this "negative conflict of jurisdiction,"[6] the *military* court submitted the question of its jurisdiction to the Brazilian Supreme Federal Court for decision. Speaking for a unanimous court, Mr. Justice Falcao ruled:

> [I]t is my duty to judge correct the present refusal of the Brazilian authorities to acknowledge jurisdiction and to declare competent the military courts of the United States to try and judge the American sailor [sic] in question.[7]

Mr. Justice Falcao reasoned that under international law Brazil as a State had no right to exercise its territorial jurisdiction over Gilbert's crime and that under domestic law the Brazilian military courts had no jurisdiction over Gilbert's person. As to this latter reason he stated:

> The Military Penal Code . . . provides in Article 9:
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> "Foreign military persons, when serving in commission with the Brazilian armed forces, are subject to Brazilian military penal law, except where provisions exist to the contrary in conventions and treaties."

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[6] *Ibid.*

[7] DIARIO DA JUSTICA, Aug. 21, 1945, 8 Jurisprudencia at ______, as translated in King, *Further Developments Concerning Jurisdiction Over Friendly Foreign Armed Forces*, 40 AM. J. INT'L L. 257, 263 (1946).

> It follows from this provision that, if the alien military person is not serving in commission with the armed forces of Brazil, there is no way in which he can be made subject to Brazilian military penal law.[8]

Assuming *arguendo* that in *In re Gilbert* the *civil* court had had jurisdiction under Brazilian law over both Gilbert's person and alleged crime, there would still be the further requirement that the court have jurisdiction under international law over Gilbert's alleged crime and the right under international law to exercise that jurisdiction. Were the civil court to lack either this jurisdiction under international or this right under international law the court would lack jurisdiction over Gilbert's case. For "it is clear . . . that the sovereign cannot confer legal jurisdiction on his courts . . . when he has no such jurisdiction according to the principles of international law."[9] While a sovereign "has such power so far as his own territory is concerned . . . such extension will not be recognized by other sovereigns."[10]

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[8] DIARIO DA JUSTICA, Aug. 21, 1945, 8 Jurisprudencia at ______, [1946] Ann. Dig. at 88-89.

[9] Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241, 243 (1923).

[10] *Id.* at 244.

B. CRIMINAL JURISDICTION OF STATES UNDER INTERNATIONAL LAW.

1. Jurisdiction Over Crimes Generally. A State has jurisdiction under international law over a crime when it is competent under international law to prosecute and punish for an act or omission made an offense by its municipal law.[11] There are two views, however, as to how a State becomes so competent. One view is that, since "a State has only that competence with which it is vested by international law,"[12] such competence must have been accorded it by international law. As Judge Jessup wrote in the introduction to his Territorial Waters and Maritime Jurisdiction:

> When speaking of the rightfulness of court proceedings . . . consideration will be given to the problem whether international law permits a state to take jurisdiction . . . .[13]

The second view is that "it follows from the very nature of sovereignty that a State must be considered competent unless it can be shown that it is expressly restricted by a rule

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[11] Harvard Research in International Law, Jurisdiction with Respect to Crime, arts. 1(b). 1(c), 29 AM. J. INT'L L. SPEC. SUPP. 435, 439 (1935) /hereafter cited as Jurisdiction with Respect to Crime/.

[12] Jurisdiction with Respect to Crime, art. 1(b), comment, 466.

[13] JESSUP, TERRITORIAL WATERS AND MARITIME JURISDICTION xxxiii (1927).

of international law."[14] These were the contending views, for example, in the Case of S.S. "Lotus."[15] There the Permanent Court of International Justice noted:

> The French Government contends that the Turkish courts, in order to have jurisdiction, should be able to point to some title to jurisdiction recognized by international law in favor of Turkey. On the other hand, the Turkish Government takes the view that Article 15 allows Turkey jurisdiction wherever such jurisdiction does not come into conflict with a principle of international law.[16]

It would appear from the following that the court adopted the Turkish view in this case:

> In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.[17]

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[14] Jurisdiction With Respect to Crime, art. 1(b), comment, 468.

[15] P.C.I.J., ser. A, No. 10 (1927) /hereafter cited as The Lotus/.

[16] Id. at 18.

[17] P.C.I.J., ser. A, No. 10, at 19. "The two points of view presented in . . . the S.S. Lotus may be regarded as essentially nothing more than two avenues of approach to a single principle, significant only as the choice between them may determine which contestant should take the initiative in proving the law in the case before the court. One avenue of approach emphasizes the idea of capacity to act in the exercise of competence, the other the idea of limitations upon capacity." Jurisdiction With Respect to Crime, art. 1(b), comment, 468.

If, however, an act of omission is *not* made an offense by a State's own penal laws, it will *never* be competent under international law to prosecute or punish for that act or omission. Such a situation must be carefully distinguished from that present in *In re Gilbert*. There, while unlawful homicide was made an offense by Brazilian law, the Brazilian Supreme Federal Court ruled that "there is no way in which he [Gilbert] can be made subject to Brazilian military penal law."

2. *Jurisdiction Over Crimes Committed Within a State's Territory*. Each State "under the principles of international law . . . has jurisdiction of the offenses committed within its own territory . . . .[18] "[I]n all systems of law the principle of the territorial character of criminal law is fundamental . . . ."[19] This principle, the so-called "territorial principle,"[20] is based upon the universal recognition "that States are competent, in

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[18] Kinsella v. Krueger, 351 U.S. 470, 479 (1956), *accord*, *Jurisdiction With Respect to Crime*, art. 3, 439.

[19] The Lotus, P.C.I.J., ser. A, No. 10, at 20 (1927).

[20] United States v. Flores, 289 U.S. 137, 155 (1933).

general, to punish all crimes committed within their territory."[21] The reasons for this principle are as sound as they are obvious. "The territorial sovereign has the strongest interest, the greatest facilities, and the most powerful instruments for repressing crimes, whether committed by native-born subjects, or by domiciled aliens, in his territory."[22]

Under this rule of international law, a State has jurisdiction over all crimes commenced and consummated within its territory, over all crimes commenced within but consummated without its territory,[23] and over all crimes commenced without but consummated within its territory.[24]

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[21] Jurisdiction With Respect to Crime, art. 3, comment, 480.

[22] LEWIS, FOREIGN JURISDICTION AND THE EXTRADITION OF CRIMINALS 30 (1859).

[23] This is "the so-called subjective territorial principle." Jurisdiction With Respect to Crime, art. 3, comment, 484. E.g., in The Tennyson, Brazil asserted "jurisdiction over an explosive instrumentalities having been placed on board in Brazilian waters." Id. at 487.

[24] This is "the so-called objective territorial principle." Jurisdiction With Respect to Crime, art. 3, comment, 487. "The setting in motion outside of a State of a force which produces as a direct consequence an injurious effect therein, justifies the territorial sovereign in prosecuting the actor when he enters its domain." 1 HYDE, INTERNATIONAL LAW § 238, at 798 (2d ed. 1945) [hereafter cited as HYDE]. E.g., Ford v. United States, 273 U.S. 593, 624 (1927).

A State's "territory" includes its land territory, its internal waters, and the air space over both. In addition, "the sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea"[25] and "to the air space over the territorial sea as well as to its bed and subsoil."[26] "[I]nternational practice is not uniform as regards the delimitation of the territorial sea.[27] The United States, Great Britain, Japan, The Netherlands, Liberia, and a sizeable number of the world's other maritime powers have long accepted the historic 3-mile rule.[28]

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[25] Convention on The Territorial Sea and The Contiguous Zone, Geneva, 1958, art. 1, para. 1.

[26] Id. art. 2.

[27] International Law Comm'n, Report, U.N. GEN. ASS. OFF. REC. 11th Sess. Supp. No. 9 (A/3159)(1956), 51 AM. J. INT'L L. 154, 161 (1957).

[28] BISHOP, INTERNATIONAL LAW 489 (2d ed. 1962) [hereafter cited as BISHOP], COLOMBOS § 110, at 89-90. The British representative at the League of Nations Conference for the Codification of International Law in 1930 said "that the 3-mile rule was favored because it 'is a rule of international law already existing, adopted by maritime nations which possess nearly 80 per cent of the effective tonnage of the world.'" BISHOP at 490.

Few nations claim more than 12 nautical miles[29] since "International law does not permit an extension of the territorial sea beyond 12 miles."[30] However, attempts at the Hague Conference for the Codification of International Law in 1930,[31] at the First Geneva Conference on the Law of the Sea in 1958,[32] and at the Second Geneva Conference on the Law of the Sea in 1960[33] to put an outer limit on the territorial sea were unsuccessful. At present the United States is willing to agree to a 6-mile limit if it can be arranged by multilateral treaty. In the absence

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[29] *E.g.*, "Chile might be listed as claiming either 50 kilometers or 200 miles." BISHOP at 489.

[30] International Law Comm'n, *Report*, U.N. GEN. ASS. OFF. REC. 11th Sess. Supp. No. 9 (A/3159)(1956), 51 AM. J. INT'L L. 154, 161 (1957).

[31] Reeves, *Codification of the Law of Territorial Waters*, 24 AM. J. INT'L L. 496 (1930).

[32] Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INT'L L. 607 (1958), Jessup, *The United Nations Conference on the Law of the Sea*, 59 COLUM. L. REV. 234 (1959), Sorensen, *The Law of the Sea*, INT'L CONC. No. 520 (1958).

[33] Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 AM. J. INT'L L. 751 (1960), Jessup, *The Law of the Sea Around Us*, 55 AM. J. INT'L L. 104 (1961).

of such a treaty it takes the position that the 3-mile limit is all it must recognize under international law.[34]

3. Jurisdiction Over Crimes Committed Outside a State's Territory on Board Ships of its National Character.

A State under international law "has jurisdiction with respect to any crime committed in whole or in part upon a public or private ship . . . which has its national character."[35] This competence applies whether the ship is on the high seas or in foreign waters. Thus in *United States v. Bevans*,[36] a case involving the murder of a Navy cook's mate committed on board *The Independence*, Mr. Chief Justice Marshall stated that the proposition that the "government . . . has power to punish an offence committed by a marine on board a ship of war, *wherever that ship may lie*, is a proposition never to be questioned in this court."[37]

Where there is some disagreement as to the theoretical basis of this competence, "the jurisdiction of the

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[34] Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 AM. J. INT'L L. 751, 773 n.23 (1960).

[35] *Jurisdiction With Respect to Crime*, art. 4, 439.

[36] 16 U.S. (3 Wheat.) 336 (1818).

[37] *Id.* at 390.

State over crime on its seagoing vessels, public and private, has become well established in international law."[38] Clearly ships are not territory. On the other hand, it is almost universally recognized that a State has with respect to its public and private ships "a jurisdiction which is similar to its jurisdiction over its territory."[39] Theoretically, the older view was that a ship on the high seas and in foreign waters should be regarded, for jurisdictional purposes, as a kind of "floating island" of the flag-State.[40] Most modern writers and jurists, however, have rejected this territorial fiction and have justified a State's jurisdiction over its ships on grounds of mere convenience.[41]

Claims of jurisdiction over crimes committed on board warships[42] are generally unrestricted. Almost every

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[38] Jurisdiction With Respect to Crime, art. 4, comment, 510.

[39] Id. at 509.

[40] E.g., The Lotus, P.C.I.J., ser. A, No. 10, at 62, 69 (1927)(Nyholm and Moore, JJ., dissenting).

[41] E.g.,The Lotus, P.C.I.J., ser. A, No. 10, at 39, 53 (1927)(Loder and Finlay, JJ., dissenting). I HYDE, INTERNATIONAL LAW § 227, at 753 (2d ed. 1945).

[42] The term "warship" is used but not defined in the Convention on The Territorial Sea and the Contiguous Zone, Geneva, 1958. As used in the Convention on The High Seas, Geneva, 1958, the term is specifically defined to mean "a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its

State claims jurisdiction, for example, over crimes committed on board its warships while in foreign waters, whether committed by nationals or aliens or committed by crew members or mere visitors on board. "National codes which limit this competence . . . to crimes by a person connected with the vessel are distinctly exceptional."[43] However, in the Treaty on International Penal Law[44] a number of South American nations[45] agreed that

> If in the performance of the criminal acts there took part only persons not belonging to the personnel of the warship, the trial and punishment will take place according to the laws of the State in whose territorial waters the vessel is.[46]

Claims of jurisdiction over crimes committed on board other types of ships are frequently restricted. As to national merchant ships in foreign ports, for example,

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nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline." Convention on the High Seas, Geneva, 1958, art. 8, para. 2.

[43] Jurisdiction With Respect to Crime, art. 4, comment, 512.

[44] Signed at Montevideo, Uruguay, Jan 23, 1889, 18 Martens N.R.G. (2d ser.) 432.

[45] The signatories were Argentina, Bolivа, Paraguay, Peru, and Uruguay.

[46] Title I, art. 9, para. 3, Martens N.R.G. (2d ser.) at 434, as translated in Jurisdiction With Respect to Crime, app. 3, 638-39.

some States assert jurisdiction only as "to crimes which do not disturb the tranquility of the foreign port, or to crimes committed by persons who are members of the ship's personnel or passenger list, leaving jurisdiction in other cases exclusively to the littoral State."[47] On the other hand, other States assert the same jurisdiction over crimes committed on board other types of ships as is made over crimes committed on board warships. For example, "the criminal law of England extends to all offences committed on British ships either by British subjects or by foreigners, either on the high seas or in foreign harbours or rivers below bridges where great ships go."[48] And the United States claims jurisdiction over crimes committed on board

> any vessel belonging in whole or in part to the United States, or any citizen thereof, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State . . . .[49]

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[47] Jurisdiction With Respect to Crime, art. 4, comment, 513.

[48] STEPHEN & STEPHEN, CRIMINAL PROCEDURE art. 3, at 2 (1883).

[49] 18 U.S.C. § 7(1) (1958)

Those crimes over which the United States claims such jurisdiction (e.g., murder,[50] manslaughter,[51] assault,[52] and robbery[53]) are identifiable by the provision within each such penal provision making its specifically applicable "within the special maritime and territorial jurisdiction of the United States," a jurisdiction which is defined by federal law[54] to include a number of locations in addition to American vessels on the high seas and in foreign waters.

United States v. Flores[55] dramatically illustrates the exercise of "the special maritime . . . jurisdiction of the United States." In 1933 Flores, a merchant seaman, murdered a fellow American while on board The Padnsay, an American merchant ship at anchor in the Port of Matadi, Belgium Congo, some 250 miles inland from the mouth of the Congo River. Upon Flores return to the United States he was indicted for murder. However, the Federal District Court for Eastern Pennsylvania held it was without jurisdiction to try the offense charged. In ruling on that court's jurisdiction, Mr. Justice Stone, speaking for a unanimous Supreme Court, said:

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[50] 18 U.S.C. § 1111 (1958) [51] 18 U.S.C. § 1112 (1958)

[52] 18 U.S.C. § 113 (1958) [53] 18 U.S.C. § 2111 (1958)

[54] 18 U.S.C. § 7 (1958) [55] 289 U.S. 137 (1933).

> It is true that the criminal jurisdiction of the United States is in general based on the territorial principle . . . . But that principle has never been thought to be applicable to a merchant vessel which, for the purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed. Upon it, is deemed to be a part of the territory of that sovereignty, and not to lose that character when in navigable waters within the territorial limits of another sovereignty. . . . In the absence of any controlling treaty provision, and any assertion of jurisdiction by the territorial sovereign, it is the duty of the courts of the United States to apply to offenses committed by its citizens on vessels flying its flag, its own statutes, interpreted in the light of recognized principles of international law.[56]

4. *Jurisdiction Over Crimes Committed Outside a State's Territory by Nationals*. A State under international law "has jurisdiction with respect to any crime committed outside its territory . . . [by a] person who was a national[57] of that State when the crime was committed or who is a national of that State when prosecuted or punished . . . .[58] Mr. Hall has provided the most frequently quoted reason for this rule:

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[56] *Id.* at 155-56, 159.

[57] "A 'national' of a State is a natural person upon whom that State has conferred its nationality . . . in conformity with international law." *Jurisdiction With Respect to Crime*, art. 1(e), 439.

[58] *Id.*, art. 5, at 440.

> The authority possessed by a state community over its members being the result of the personal relation existing between it and the individuals of which it is formed, its laws travel with them wherever they go, both in places within and without the jurisdiction of other powers. A state cannot enforce its laws within the territory of another state, but its subjects remain under an obligation not to disregard them, their social relations for all purposes as within its territory are determined by them, and it preserves the power of compelling observance by punishment if a person who has broken them returns within its jurisdiction.[59]

"This competence is justified on the ground that a State's treatment of its nationals is not ordinarily a matter of concern to other State or to international law."[60] There are, however, substantial differences between the claims of various States to this competence. The Russian penal legislation of 1926, for example, asserted on the nationality principle the following very broad jurisdiction over extraterritorial crime:

> The application of the present code is extended to all citizens of the R.S.F.S.R. who have committed socially-dangerous acts within the R.S.F.S.R. as well as outside the U.S.S.R., provided that they are apprehended on the territory of the R.S.F.S.R.[61]

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[59] HALL, INTERNATIONAL LAW § 10, at 55-56 (8th ed. Higgins 1924) [hereafter cited as HALL].

[60] *Jurisdiction With Respect to Crime*, art. 5, 519.

[61] R.S.F.S.R. Penal Code art. 2 (1926)(U.S.S.R.) as translated in *Jurisdiction With Respect to Crime*, art. 5, comment, 523-24. "A 'socially-dangerous' act within the meaning of this article is coextensive with the Russian qualification of criminal offence . . . ." *Id.* at 524.

On the other hand, "the exercise of such jurisdiction is perhaps the exception rather than the rule in countries deriving their jurisprudence from the English common law . . . . ."[62] The exercise of this jurisdiction by the United States, for example, while explainable in part by Congress's limited constitutional power to enact common-law type crimes, has been limited primarily to crimes which injure the property, functions, and security of the United States of its instrumentalities. Some criminal statutes of the United States, such as the statute on treason which follows, are expressly extra-territorial in effect:

> Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.[63]

While most United States statutes are not expressly extra-territorial in effect and "are not by implication given an extra-territorial effect,"[64] some have been interpreted as

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[62] Jurisdiction With Respect to Crime, art. 5, comment, 520.

[63] 18 U.S.C. § 2381 (1958). This statute has been applied in a number of cases to act committed by nationals abroad. E.g., Kawakita v. United States, 343 U.S. 717 (1952).

[64] United States v. Flores, 289 U.S. 137, 155 (1933).

the courts to be extra-territorial. For example, in United States v. Bowman,[65] a prosecution of three American nationals for fraud against the United States committed in Brazil, the Supreme Court ruled:

> The three defendants who were found in New York were citizens of the United States and were certainly subject to such laws as it might pass to protect itself and its property. Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance.[66]

5. Jurisdiction Over Crimes Committed Outside a State's Territory by Members of its Armed Forces. A State under international law has jurisdiction with respect to any crime committed abroad by a member of its armed forces. This competence is universally claimed. The United States Congress, for example, when enacting the Uniform Code of Military Justice[67] in 1951, provided that this "code shall be applicable in all places."[68] In discussing the UCMJ's

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[65] 260 U.S. 94 (1922).

[66] Id. at 102.

[67] 10 U.S.C. §§ 801-940 (1958) [hereafter referred to and cited as UCMJ].

[68] UCMJ, art. 5.

extra-territorial applicability, the United State Supreme Court has said:

> In selecting the Uniform Code of Military Justice, Congress might have sought to avoid needless and potentially harmful duplication of a legal system already extant in every foreign nation where our troops are stationed. On the other hand, Congress would well have determined that the Code was adequate to the purpose to be achieved and would afford more safeguards to an accused than any other available procedure. The Code is a uniform system of legal procedure, applicable beyond any constitutional question to all servicemen stationed abroad.[69]

Challenges to the legality of such extra-territorial claims, while rare, have occurred. In In re Polimeni[70] an Italian soldier, while stationed in the Saar Territory during the 1935 plebiscite, assaulted a British soldier. Upon the culprit's return to Italy he was brought to trial before the Military Court of Rome. When that court's jurisdiction was put in issue, the court ruled that Polemeni was subject "to Italian military criminal jurisdiction, regardless of whether the crime is one of military or common law . . . ."[71] And in Jennings v.

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[69] Kinsella v. Krueger, 351 U.S. 470, 478 (1956). (Emphasis added.)

[70] Military Court of Rome, April 15, 1935, 60 FORO ITALIANO II. 381 (1935), [1935-37] Ann. Dig. 248 (No. 101).

[71] Id. at _____, [1935-37] Ann. Dig. at 249.

Markley[72] a former United States Army soldier, convicted by general court-martial for a murder committed in Korea, alleged in a habeas corpus action that at the time of his crime "although he was in the service of the United States Army, he was '<u>under the jurisdiction of the United Nations</u>,' . . . ."[73] A United States District Court denied the prisoner's petition, holding that his "theory . . . is completely devoid of merit."[74]

Where a national has committed a crime while serving in his State's armed forces, that State's exercise of jurisdiction over his crime is merely an example of jurisdiction based upon the nationality principle.[75] Aliens, however, frequently also serve in a State's armed forces, Professor Bloomfield points out

> that Admiral Nelson's own flagship at the Battle of Trafalgar -- H.M.S. *Victory* -- was crewed by Englishmen, Scotsmen, Irishmen, Welshmen and various islanders, and the following: twenty-two Americans, seven Dutchmen, six Swedes, three Frenchmen, two Danes, three Norwegians, one Russian, three Germans, two Swiss, two Portuguese, four Italians, two Indians, one African, nine West Indians, and four Maltese.[76]

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[72] 186 F. Supp. 611 (S.D. Ind. 1960). 37 NOTRE DAME LAW. 82 (1961).

[73] *Id.* at 612.

[74] *Ibid.*

[75] United States v. Siniger, 6 USCMA 330, 336, 20 CMR 46, 52 (1955).

[76] BLOOMFIELD, INTERNATIONAL FORCES 4-5 (1964).

Today, for example, a sizeable number of Filipinos, Canadians, and Europeans are serving in the United States Navy.

When an alien seaman commits an offense "in whole or in part upon a ship . . . having its national character, the State has jurisdiction by virtue of the place of the offence."[77] Thus in <u>Chung Chi Cheung v. The King</u>,[78] where an alien seaman had committed murder on board an armed Chinese customs cruiser while in British territorial waters, the Privy Council held that "the Chinese Government could clearly have had jurisdiction over the offence."[79] "As to offences committed elsewhere by the alien seaman of a national vessel, the State has jurisdiction by virtue of the assimilation"[80] effected by the rule of international law which makes a State competent over the crimes of an alien "while engaged as one of the personnel of a ship . . . having the national character of that State."[81]

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[77] <u>Jurisdiction With Respect to Crime</u>, art. 6, comment, 542.

[78] [1939] A.C. 160, [1938-40] Ann. Dig. 264 (No.87). 53 HARV. L. REV. 497 (1940), 51 JURID. REV. 177 (1939), 2 RES JUDICATAE 75 (1939), 6 SOL. 28 (1939).

[79] <u>Id.</u> at _____, [1938-40] Ann. Dig. at 271-72.

[80] <u>Jurisdiction With Respect to Crime</u>, art. 6, comment, 542.

[81] <u>Id.</u> art. 6(b), at 440.

6. Exclusive and Concurrent Jurisdiction.

a. Exclusive jurisdiction.

(1) Visiting State. When, for example, a member of a visiting naval force commits a crime over which only the visiting State under international law has jurisdiction, the visiting State has under international law exclusive jurisdiction over that crime. The exclusive nature of the visiting State's jurisdiction has resulted from two lines of reasoning. One approach, now generally discarded, is that a visiting warship is a temporary enclave of its flag-State, that a crime committed on board such a warship is committed without the littoral State's territory, and that if the littoral State's jurisdiction over such crime depends upon it having been committed in whole or in part within its territory, then the warship's flag-State has exclusive jurisdiction over such crime.[82] Another line of reasoning, now generally accepted, is that a visiting warship is within the littoral State's territory

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[82] *E.g.*, "Crime committed on board [a visiting warship] by persons in the service of the vessel are under the exclusive jurisdiction of the commander and the other home authorities." I OPPENHEIM, INTERNATIONAL LAW § 450, at 854 (8th ed. Lauterpacht 1955) [hereafter cited as OPPENHEIM]. (Emphasis added.)

but that certain crimes, not being punishable under the littoral State's penal laws, are crimes over which the warship's flag-State has *exclusive* jurisdiction.[83]

(2) *Territorial State*. When a member of a visiting naval force commits a crime over which *only* the territorial State under international law has jurisdiction, the territorial State under international law has *exclusive* jurisdiction over that crime. Thus the NATO Status of Forces Agreement provides that

> The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force . . . with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.[84]

b. *Concurrent jurisdiction*. When each of two States has, under international law, jurisdiction over a particular crime, then these two States have, under international law, *concurrent* jurisdiction over that crime. For

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[83] *E.g.*, "The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State." NATO Status of Forces Agreement, art. VII, para. 2(a).

[84] Art. VII, para. 2(b).

example, when a serious crime is committed on board a visiting warship or ashore by a member of a visiting armed force, the visiting and territorial States often have concurrent jurisdiction. In United States v. Sinigar,[85] the accused was first jailed for his conduct in Canada by the Canadian authorities and after his release was tried and convicted by an Army general court-martial for the same conduct. He then raised the "question of double jeopardy" before the United States Court of Military Appeals. Judge Latimer stated for the court:

> We have here two sovereignties, deriving power from different sources, and capable of dealing with the same subject matter within the same territory. United States v. Lanza, 260 US 377, 43 S Ct 141, 67 L ed 314 (1922). Assuming for the moment that there was but one act done by the accused, international law has long recognized the possibility of the existence of two concurrent jurisdictions. 1 Oppenheim, International Law, 7th (Lauterpacht's) ed. § 145. In this case, jurisdiction in the United States springs from its personal supremacy over the individual, while Canadian jurisdiction is founded upon its sovereignty in the place where the offense occurred.[86]

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[85] USCMA 330, 20 CMR 46 (1955).

[86] Id. at 336, 20 CMR at 52.

7. The Primary Right to Exercise Concurrent Jurisdiction.

a. *Generally.* When a serious crime is committed on board a visiting warship or by a member of a visiting naval force ashore and when the visiting and territorial States each asserts its right to exercise its concurrent jurisdiction over such crime, there arises an international conflict of jurisdiction. To resolve this conflict, the question must be asked: Which State has the *primary right to exercise its concurrent jurisdiction*? This question is in fact the principal question under consideration in this study. Concerning crimes committed on board visiting merchant ships the United States Supreme Court has said:

> There is not entire agreement among nations or the writers on international law as to which sovereignty should yield to the other when the jurisdiction is asserted by both.[37]

This same observation could be made concerning crimes committed on board visiting warships. Although this question has not infrequently been framed -- Which States has *jurisdiction*? -- such question as framed, it will be seen, not only is legally incorrect but confuses the real

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[37] United States v. Flores, 289 U.S. 137, 158 (1933).

issue. Thus in *Ministere Public v. Korakis*,[88] the Egyptian Mixed Court of Cassation, being careful to distinguish between a State's concurrent jurisdiction and a State's primary right to exercise that jurisdiction, "pointed out that it was not a question of the *existence* of jurisdiction, for each sovereign State possessed and preserved its own jurisdiction, but of the *exercise* of jurisdiction . . . ."[89]

b. *International courtesy extended by one State*. When one State with jurisdiction extends to another State with jurisdiction what has been called "international courtesy," the question -- Which State has the primary right to exercise its jurisdiction? -- becomes moot. For example, "where the offence is a *minor* one, it is usual [for the territorial State] as a matter of comity to hand the offender over to the [visiting warship's] commanding officer for disciplinary action."[90] Thus Hall states that

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[88] Mixed Court of Cassation, Dec. 11, 1944, 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 66 (1944-45), [1943-45] Ann. Dig. 120 (No. 34).

[89] *Id.* at 67, [1943-45] Ann. Dig. at 121. (Emphasis added.)

[90] BRIERLY, LAW OF NATIONS 269 n.2 (6th ed. Waldock 1963) [hereafter cited as BRIERLY].

> The practice in Great Britain appears to be that . . . in case of *minor* offences, such as drunkenness, the offender is simply detained until he can be handed over to a superior officer of the ship to which he belongs, but this is done as a matter of *courtesy*.[91]

On the other hand, where the offense is *more serious* international courtesy is less frequently accorded to the visiting State.[92] It is not unusual, however, to find instances where international courtesy has been accorded by the territorial State in cases involving *very serious* offenses. Thus Colombos reports that

> In September 1926, when a seaman of the U.S. destroyer *Sharkey* died in England as a result of wounds received in a shooting affray with another seaman of the U.S. destroyer *Lardner* in the outskirts of Gravesend, the British Government consented, on the application of the American Ambassador in London, and as a matter of international courtesy, to hand over the culprit to the American authorities, although he had already been convicted by a coroner's jury of "wilful murder." In the statement issued by the Home Secretary, the opinion of the British Government was expressed that "in the special circumstances of this case, a United States tribunal would be the more convenient Court," particularly in view of the "assurance given by the Ambassador" that the guilty person would be dealt with in accordance with the U.S. Navy Court-martial Regulations.

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[91] HALL 249-50 n.1. (Emphasis added.)

[92] BRIERLY, LAW OF NATIONS 177 (4th ed, 1949), I OPPENHEIM § 451, at 855 n.3.

> "In coming to this decision, the Secretary of State had in mind the fact that both the accused and the injured person belonged to the U.S. Navy and that no British subject was directly concerned."[93]

c. Waiver by one State of its right. If, of course, one of the two States with concurrent jurisdiction waives its right to exercise that jurisdiction, then the question -- which State has the primary right to exercise its concurrent jurisdiction? -- also becomes moot. In United States v. Flores, the territorial State failed to assert its right to exercise its concurrent jurisdiction over Flores' crime. Appreciating that the question -- which State, Belgium or the United States, has the primary right to exercise its concurrent jurisdiction? -- was thus not before the court, the United States Supreme Court noted:

> A related but different question, not presented here, may arise when /the right to exercise its concurrent/ jurisdiction over an offense committed on a foreign vessel is asserted by the sovereignty in whose waters it was lying at the time of its commission, since for some purposes that jurisdiction may be regarded as concurrent, in that the courts of either sovereignty may try the offense.[94]

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[93] COLOMBOS § 289, at 251-52.

[94] 289 U.S. at 157. (Emphasis added.)

d. *Inability of one State to exercise its jurisdiction.* If one of the two States with concurrent jurisdiction is unable for one of a number of reasons, to exercise its jurisdiction, then the question -- which State has the primary right to exercise its concurrent jurisdiction? -- also is moot.

No conflict of jurisdiction arises, for example, when a key witness is physically located where one of the two States with concurrent jurisdiction has no right to serve its criminal process. Thus Lord Atkin, in *Chung Chi Cheung v. The King*, stated:

> [I]f a resident in the receiving State visited the public ship and committed theft, and returned to shore, it is conceivable that when he was arrested on shore and shore witnesses were necessary to prove dealings with the stolen goods and identify the offender, would the local Courts have no jurisdiction? What is the captain of the public ship to do? Can he claim to have the local national surrendered to him? *He would have no claim to the witnesses, or to compel their testimony in advance, or otherwise.* He naturally would leave the case to the local Courts.[95]

e. *International law resolves an international conflict of jurisdiction.* When, however, two States with concurrent jurisdiction over a crime each asserts its own concurrent jurisdiction over that crime there

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[95] [1939] A.C. at ____, [1938-40] Ann. Dig. at 269-70. (Emphasis added.)

develops an international conflict of jurisdiction. In each such conflict there is -- or should be -- a rule of international law that one of the States had waived not its jurisdiction over the crime but its *right* to exercise that jurisdiction. Thus in *Anne v. Ministere Public*[96] the Egyptian Mixed Court of Cassation observed:

> Without doubt the jurisdiction of the territorial power arising in accordance with its own laws is subject to the recognized rights of the foreign military authorities in question, but only in accordance with the *limits imposed by international law regarding the exercise of that jurisdiction*.[97]

Dean Gregory records such an international conflict of law which was so resolved at the turn of the century.

> [I]n 1900 the question arose between the governments of the United States and Japan, in the case of the demand for the surrender of a man on a United States government transport at Nagaski [sic], charged with a crime committed upon a Japanese on board. The local officials were denied the right to arrest, and, on the representations of the minister to the Japanese government that the ship was a transport belonging to the United States government, *want of jurisdiction* was acknowledged.[98]

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[96] Mixed Court of Cassation, Dec. 13, 1943, 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 52 (1944-45), [1943-45] Ann. Dig. 115 (No. 33).

[97] *Id.* at 54, [1943-45] Ann. Dig. at 118. (Emphasis added.)

[98] Gregory, *Jurisdiction Over Foreign Ships in Territorial Waters*, 2 MICH. L. REV. 333, 344 (1904). (Emphasis added.)

CHAPTER III

RULES OF JURISDICTION OVER CRIMES COMMITTED ON BOARD VISITING WARSHIPS

A. EVOLUTION OF THE RULES OF JURISDICTION.

1. European Continent.

a. Origin of the doctrine of exterritoriality. It is not surprising that at an early and unrecorded date military forces "visiting" back and forth across the face of the European continent came to be accorded that freedom from local jurisdiction signified by the term "exterritoriality." It appears, reports Hall, "that the fiction of the exterritoriality[1] of an army had come into existence, and seems to have been recognized, in the time of Baldus (circa 1400)."[2] Considering the concentrated national presence and power evident in the visit of a warship in foreign waters, it would not be surprising if the fiction of a visiting warship's exterritoriality had come into existence at an even earlier date.

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[1] More properly the fiction was one of territoriality. As the term "exterritoriality" is understood today (i.e., freedom from the jurisdiction of the territorial State), the visiting army's exterritoriality was a fact, not a fiction.

[2] HALL 237 n.1.

b. Ortolan's rationale. In 1845, Ortolan, the French publicist, provided a very quotable rationale for this fiction. No doubt reflecting his own experiences and views as a former naval officer, Ortolan called

> a vessel of war a movable fortress, bearing on its breast a portion of the public power of the state, with officers and equipage, which, altogether, form an organized corps of functionaries and agents, military or administrative, of the nation . . . . [A]s to these ships the international custom is constant. The laws, the authorities, and the jurisdictions of the state in whose waters they are anchored, remain foreign to them. They have with that state but international relations, by the voice of the functionaries of that locality competent for such relation.[3]

Ortolan, citing Wheaton and Vattel as his authority,[4] concludes

> that crimes . . . committed on board a vessel of war in a foreign port, or territorial waters, by members of the crew, or any one else, fell solely under the jurisdiction of

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[3] ORTOLAN, RÈGLES INTERNATIONALES ET DIPLOMATIE DE LA MER 214 (3rd ed. ____), as translated in Gregory, Jurisdiction Over Foreign Ships in Territorial Waters, 2 MICH. L. REV. 333, 341 (1904).

[4] Gregory, Jurisdiction Over Foreign Ships in Territorial Waters, 2 MICH. L. REV. 333, 342 (1904).

> the tribunal of the nation to which the war ship belongs, and are tried according to the laws of that nation.[5]

Thus, in Ortolan's view, the visiting warship was a temporary enclave of the visiting State, surrounded by but yet completely without the littoral State's territorial waters. While the visiting State had *exclusive* jurisdiction over *all* crimes committed on board its warship, the littoral State had neither territorial jurisdiction with respect to any of these crimes nor the right to serve its criminal process on board.

c. *Support for the doctrine of exterritoriality.* This doctrine, sometimes also referred to as the "French rule,"[6] the "high doctrine of exterritoriality,"[7] the "extreme doctrine of exterritoriality,"[8]

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[5] I ORTOLAN, REGLES INTERNATIONALES ET DIPLOMATIE DE LA MER 298 (3rd ed. _____), as translated in Gregory, *Jurisdiction Over Foreign Ships in Territorial Waters*, 2 MICH. L. REV. 333, 344 (1904).

[6] Gregory, *Jurisdiction Over Foreign Ships in Territorial Waters*, 2 MICH. L. REV. 333, 341 (1904).

[7] *Chung Chi Cheung v. The King*, [1939] A.C. 160, _____, [1938-40] Ann. Dig. 264, 268 (No. 87).

[8] *Id.* at _____, [1938-40] Ann. Dig. at 267.

and the fiction of "extra-territoriality,"[9] had a substantial number of adherents[10] until just before World War II, especially on the Continent and in countries deriving their jurisprudence from the Civil law. It was this doctrine, for example, which was adopted in 1898 at The Hague by the influential Institute of International Law in the following "regulation":

> Crimes and offenses committed on board these [war] ships or on boats belonging to them, whether by members of the crew, or by any others on board, shall come under the jurisdiction of the courts of the nation to which the ship belongs and shall

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[9] I HALLECK, INTERNATIONAL LAW 232 (4th ed. Baker 1908) [hereafter cited as HALLECK].

[10] For a brief discussion of Continental practice and writings up to the end of the nineteenth century, see HALL 244-45. For Lord Chief Justice Cockburn's 1876 analysis of the position of European writers on the doctrine of exterritoriality, see note 72 *supra*. The position of Emer de Vattel, the Swiss publicist. In discussing the nationality of children born at sea he wrote, "If children are born on a vessel belonging to the Nation they may be considered as born within its territory; for *it is natural to regard the vessels of a Nation as portions of its territory, especially* when they are upon the high seas, since the State retains jurisdiction over them; and since *by common custom this jurisdiction over the vessel is retained even when the vessel is in waters subject to the jurisdiction of another State*, all children born upon the vessels of a Nation are considered as born within its territory." III VATTEL, LAW OF NATIONS bk. I, ch. XIX, § 216, at 88 (Carnegie Institute of Washington "The Classics of International Law" No. 4, 1916) [hereafter cited as VATTEL]. (Emphasis added.)

> be judged according to the laws of that nation, whatever be the nationality of the perpetrators or the victims.[11]

Professor Oppenheim's following provision on this subject has generally been interpreted as supporting the rule that the visiting State has exclusive jurisdiction over all crimes committed on board its warships while in foreign territorial waters:[12]

> The position of men-of-war in foreign waters is characterized by the fact that they are called 'floating portions of the flag-State.' For at the present time there is a customary rule of International Law, universally recognized, that the State owning the waters into which foreign men-of-war enter must treat them in every point as though they were floating portions of their flag-State. Consequently, a man-of-war, with all persons and goods on board, remains under the jurisdiction of her flag-State even during her stay in foreign waters. . . . . Crimes committed on board by persons in the service of the vessel are under the exclusive jurisdiction of the commander and the other home authorities. Individuals

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[11] Institute of International Law, Regulations Concerning the Legal Status of Ships and Their Crews in Foreign Ports, art. 16, para. 1 (Aug. 23, 1898), 17 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 277 (1898), RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 147 (Scott ed. 1916). Those apparently responsible for the draft of these regulations were all from the Continent: Messrs. Feraud-Geraud and Lyon-Caen of France and Mr. Kleen of Sweden and Norway. RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 143-44 (Scott ed. 1916).

[12] E.g., "Their Lordships have no hesitation in rejecting the doctrine of exterritoriality expressed in the words of Mr. Oppenheim . . . ." Chung Chi Cheung v. The King, [1939] A.C. at _____, [1938-40] Ann. Dig. at 267.

> who are subjects of the littoral State and are only temporarily on board may, although they need not, be taken to the home country of the vessel, to be punished there, if they commit a crime on board.[13]

While Oppenheim expressly states that the visiting State has "exclusive jurisdiction" over the "crimes committed on board by persons in the service of the vessel," he appears to imply that the visiting and territorial States have concurrent jurisdiction over the crimes of "individuals who are subjects of the littoral State and are only temporarily on board" when stating that they "may, although they need not, be taken to the home country of the vessel, to be punished there, ..." However, it is legally untenable for a visiting warship to be without the territorial State's jurisdiction with respect to the crimes of the crew and within such jurisdiction with respect to the crimes of the territorial State's nationals who are temporarily on board. While Oppenheim's "exclusive jurisdiction" could be interpreted as meaning "primary right to exercise its concurrent jurisdiction," a right which a visiting State has when immune from the

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[13] I OPPENHEIM, INTERNATIONAL LAW § 450, at 764-65 (7th ed. Lauterpacht 1948).

territorial State's exercise of its jurisdiction, such an interpretation -- considering the context -- would be unreasonable.[14] Giving Oppenheim's provision[15] the most literal interpretation, however, does not make him a proponent of the doctrine of exterritoriality to the extreme that Ortolan stated the doctrine. As Barton observes, "[T]he stoutest protagonists of the theory of exterritoriality as applied to the jurisdictional immunities of visiting forces have not applied the principle behind the fiction to its logical extreme."[16]

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[14] Lauterpacht, however, gave some support for this *concurrent* jurisdiction interpretation when he stated in his annotation of Oppenheim's provision, "As in other cases of *jurisdictional immunity*, the privilege may be *waived* by the State in question." *Id*. § 450, at 765. n.l. (Emphasis added.) "Jurisdictional immunity" relates not to "the State in question" having "exclusive jurisdiction" but rather having immunity from the exercise by another State of its jurisdiction. "Waived" also sounds in *concurrent* jurisdiction "for it is a commonplace that a foreign country cannot give territorial jurisdiction by consent." Chung Chi Cheung v. The King, [1939] A.C. at _____, [1938-40] Ann. Dig. at 267.

[15] In Lauterpacht's final edition, he revised Oppenheim's provision to eliminate "For, at the present time there is a customary rule of International Law, universally recognized, that" and to add the italized phrases as follows: "The position of men-of-war in foreign waters is characterised by the fact that, *in a sense*, they are 'floating portions of the flag-State.' The State owning the waters into which foreign men-of-war enter must treat them, *in general*, as though they were floating portions of their flag-State." I OPPENHEIM § 450, at 853.

[16] Barton, *Foreign Armed Forces: Qualified Jurisdictional Immunity*, 31 BRIT. YB. INT'L L. 341, 349-50 (1954).

d. Decline of the doctrine of exterritoriality. The doctrine of exterritoriality has been on the decline for the past century not only on the Continent but also in South America which likewise has a Civil Law tradition. For example, in the 1889 Treaty of International Penal Law, discussed above, five South American signatories apparently had no jurisdictional reason for not permitting each other to exercise jurisdiction over crimes taken place on board visiting warships where the offenders were all "persons not belonging to the personnel of the warship."[17] In 1944, Judge Falcao in In re Gilbert, speaking for a unanimous Brazilian Supreme Federal Court, clearly recognized the correct legal basis for a visiting State's jurisdictional protection:

> [I]n the teachings of Bonfils . . . [he emphasized] that the right of jurisdiction, which is a consequence and an attribute of the right of internal sovereignty, is restricted by ex-territoriality, and . . . [explained] that the latter concept is a fiction and that it is more correct to use the term 'immunity from jurisdiction', which denotes a privilege based on the necessity of safeguarding

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[17] Title I, art. 9, para. 3, Martens N.R.G. (2d ser.) at 434, as translated in Jurisdiction With Respect to Crime, app. 3, 639.

the State's freedom and independence on which rely and depend the persons concerned . . . ."[18]

2. United States of America.

a. The Schooner Exchange and the doctrine of implied immunities. In 1880 Lord Justice Brett, speaking of the exemption accorded visiting warships and other public ships, said that "the first case to be carefully considered is, and always will be, The Exchange."[19] Marshall's opinion in The Schooner Exchange v. M'Faddon[20] has proved to be the loci classici for the rule of international law defining a visiting warship's immunity from the territorial State's jurisdiction. The preeminence of Marshall's opinion in The Schooner Exchange resulted not because of

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[18] DIARIO DA JUSTICA, Aug. 21, 1945, § Jurisprudencia at ____, [1946] Ann. Dig. at 88.

[19] The Parlement Belge, 5 P.D. 197, 208 (1880). This has not always been the case. In The Prins Frederik, when the King's Advocate cited The Schooner Exchange to Lord Stowell, he asked, "Where do you find that case?" and upon being given the source did not follow the precedent. 2 Dodson's Adm. Rep. 451, 462 (1820).

[20] 11 U.S. (7 Cranch) 116 (1812) [hereafter referred to and cited as The Schooner Exchange].

a lack of earlier precedents[21] but because "Marshall for the first time gave the rule its definitive expression and modern legal form, so that from it we obtain today the acknowledged international law on the subject."[22]

The Exchange, a merchant schooner formerly owned by two Americans, had been seized and confiscated by French authorities in 1810 after a voyage from Baltimore to St. Sebastian in Spain. The French converted her into a warship at Bayonne and recommissioned her Le Balaou No. 5. When forced to put into Philadelphia for repairs, her former owners filed a libel against her in the United

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[21] E.g., United States v. Peters, 3 U.S. (3 Dallas) 121 (1795), Ketland v. The Cassius, 2 U.S. (2 Dallas) 365 (1796) (same case). In these decisions the United States Supreme Court held that a visiting warship "could not be libeled in our courts on the theory that the property of a sovereign and independent nation must be held sacred from judicial seizure." ZIEGLER, INTERNATIONAL LAW OF JOHN MARSHALL 85 (1939). In another 1795 "case" federal officers of the New York Customs House searched The Favorite, a French warship, "and seized arms and ammunition on board of her belonging to the French republic, suspected to be intended for exportation." In answer to the French minister's complaint that this search and seizure was "an infraction of the law of nations, which nothing could justify," the President said "that he highly disapproved that a public vessel of war, belonging to a foreign nation, should be searched by officers of the customs upon a suspicion of illicit commerce; that the ground of suspicion should have been represented to the consul of that nation, or the commander of the vessel." 1 OPS. ATT'Y GEN. 87, 90 (1799).

[22] ZIEGLER, INTERNATIONAL LAW OF JOHN MARSHALL 86-87 (1939).

States District Court in Philadelphia in an effort to recover possession. Marshall held that a public armed vessel of a friendly foreign state, having entered an American port open for her reception, "must be considered as having come into the American territory, under an implied promise, that while necessarily within it and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country."[23]

In holding The Exchange exempt from the jurisdiction of the United States, Marshall reasoned that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute," that "all exceptions . . . to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself," that "this consent may be either express or implied," that "all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their territories which sovereignty confers," and that "this consent may, in some instances, be tested by common usage, and by popular opinion, growing out of that usage."[24]

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[23] 11 U.S. (7 Cranch) at 147. [24] Id. at 136.

To illustrate the validity of his reasoning, Marshall stated that there is "a class of cases in which every sovereign is understood to <u>wave</u> /sic/ <u>the exercise of part of that complete exclusive territorial jurisdiction</u> . . . ."[25] Marshall then discussed three such cases. The first case was "the exemption of the person of the sovereign from arrest or detention within a foreign territory."[26] The second case was "the immunity which all civilized nations allow to foreign ministers."[27] Then Marshall said:

> A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.[28]

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[25] *Id.* at 137. (Emphasis added.)

[26] Ibid.

[27] *Id.* at 138.

[28] In 1758 Vattel stated Marshall's "third case" as follows: "The grant of a right of passage includes the grant of whatever is naturally connected with the passage of troops, and of those things without which it could not take place; this includes . . . the right to exercise military discipline over the soldiers and officers . . . ." III VATTEL bk. III, ch. VII, § 130, at 276. Even earlier the Casaregis, the Italian publicist, in his *Discursus de Commercio*, "concedes exclusive jurisdiction to a sovereign over the persons composing his naval and military forces and over his ships, wherever they may be, on the ground that the exercise of such jurisdiction is necessary to the existence of a fleet or army." HALL 237.

> In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage therefore [1] implies a waiver of all jurisdiction over the troops during their passage, and [2] permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.[29]

It is clear that Marshall was here speaking of the territorial State impliedly waiving its right to exercise its jurisdiction over the visiting State's armed forces, not of divesting itself of any territorial jurisdiction and temporarily ceding it to the visiting State. As Mr. Justice Story stated in *The Santissima Trinidad*:[30]

> In the case of the Exchange, . . . the exemption of public ships . . . . was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came

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[29] 11 U.S. (7 Cranch) at 139-40. (Emphasis added.)

[30] 20 U.S. (7 Wheat.) 283 (1822).

> within his territory; for that would be to give him sovereign power beyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction.[31]

Although Marshall used the phrase "cede a part of his territorial jurisdiction,"[32] in context it is clear that he meant this phrase to be legally equivalent to his earlier phrase, "wave [sic] the exercise of a part of that complete exclusive territorial jurisdiction." In a "ceding its jurisdiction" situation the visiting State, of course, would have exclusive jurisdiction over crimes committed by its military forces and the territorial State would have no jurisdiction which it could exercise, even were the visiting State (1) to request the territorial State to exercise jurisdiction over a crime committed by a member of its military forces or to waive its immunity with respect to such a

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[31] Id. at 352-53.

[32] Marshall's statement has, however, been quoted as it stands with approval and without qualifying interpretation. E.g., BRITTIN & WATSON, INTERNATIONAL LAW FOR SEAGOING OFFICERS 111 (2d ed. 1960) [hereafter cited as BRITTIN & WATSON]

crime, or (2) unable to effectively exercise its jurisdiction with respect to such a crime for some practical reason (e.g., key witness not subject to the visiting State's criminal process). On the other hand, in a "waiving the exercise its jurisdiction" situation the territorial State would have concurrent jurisdiction over a crime committed by a member of the visiting State's military forces which it could still exercise in any of these unusual situations.

b. The Nautalus and The Sitka. Marshall's decision in The Schooner Exchange had a profound effect on the rules observed in the United States regarding the immunities of visiting warships. One striking effect was the change in the rule concerning the service of criminal process aboard visiting warships. The leading case before The Schooner Exchange arose in 1794 when a British warship, The Nautilus, visited Newport, Rhode Island, to take on provisions. The Rhode Island General Assembly, having been advised that several Americans were being unwillingly detained on board, sent a delegation to investigate. Finding the ship's commander ashore unsuccessfully seeking provisions, the delegation obtained from him -- while he was acting apparently under some personal constraint -- a letter directing the senior

officer on board to afford them every assistance. Six Americans were found. After the ship's commander discharged them, he was able to obtain his needed provisions. The British minister in Washington complained that "the insult" was "unparalled, since the measures pursued were directly contrary to the principles which in all civilized states regulate cases of this nature."[33] In his opinion to the Secretary of State, Attorney General Bradford wrote that "the laws of nations invest the commander of a foreign ship-of-war with <u>no exemption</u> from the jurisdiction of the country into which he comes" and therefore he "cannot claim that extraterritoriality which is annexed to a foreign minister and to his domicil; but is conceived to be fully within the reach of, and amenable to, the usual jurisdiction of the State where he happens to be."[34] Mr. Bradford further opined "that a writ of habeas corpus might be legally awarded in such

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[33] HALL 239

[34] 1 OPS. ATT'Y GEN. 47, 47-48 (1794). (Emphasis added.)

case, although the respect due to the foreign sovereign may require that a clear case be made out before the writ be directed to issue."[35]

The leading case after The Schooner Exchange on the service of criminal process aboard visiting warships arose in 1854 when The Sitka, a prize captured from Russia by Great Britain during the Crimean War, sailed

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[35] Id. at 48. Mr. Bradford reasoned that "It is a writ extensively remedial; and, in Bourn's case, even before the habeas corpus act, it was declared to be 'a prerogative writ, and that it concerns the king's justice to be administered to his subjects; for the king ought to have an account why any of his subjects are imprisoned, and it is agreeable to all persons and places.' Hence it has been awarded to every part of the King's dominions -- to places usually privileged, and where, in ordinary cases, the king's writ does not run." 1 OPS. ATT'Y GEN. at 47. Congress on June 5, 1794, strengthened the exercise of local jurisdiction over visiting warships by enacting a statute which provided that in every case in which any process issuing out of any court of the United States shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, it shall be lawful for the President of the United States to employ such part of the land and naval force of the United States, or of the militia thereof as shall be judged necessary. 1 Stat. 384. In 1799, this statute was relied upon in part by Attorney General Lee in an opinion concerning The Chesterfield, a British warship. When an effort was made to serve process on board while she was lying in New York waters, the ship's commander allegedly "assaulted the ministerial officer of justice as he was leaving the ship, by attempting to remove the plank and throw him into the water." In reply to a Presidential inquiry, Mr. Lee, having considered "the general laws of nations, the treaty of London between the United States, and Great Britain, and the laws and usages of the United States," opined "that it is lawful to serve civil or criminal process upon a person on board a British ship-of-war lying in the harbor of New York . . . ." 1 OPS. ATT'Y GEN. 87 (1799).

into San Francisco Bay with a British Navy prize crew and a group of Russian prisoners on board. A California State court issued a writ of habeas corpus to produce the Russians in court but when the writ was served upon *The Sitka's* British Navy commander he set sail and departed from California waters without obeying the writ's order. When this matter was referred to United States Attorney General Cushing, he opined:

> Our courts have . . . adopted unequivocally the doctrine that a public ship of war of a foreign sovereign, at peace with the United States, coming into our ports and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country. *She remains a part of the territory of her sovereign.* . . . . So long as they [the Russian prisoners] remained on board that ship, *they were in the territory and jurisdiction of her sovereign.* . . . [T]he courts of the State of California had no jurisdiction whatever as to these prisoners on board the Sitka. . . . . The ship which he [the British commander] *commanded was a part of the territory of his country*; it was threatened with invasion by the local courts; and, perhaps, it was not only lawful, but highly discreet in him to depart, and so avoid unprofitable controversy.[36]

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[36] 7 OPS. ATT'Y GEN. 122, 130-32 (1855). (Emphasis added.)

It is especially significant to note that while the first portion of Mr. Cushing's opinion is but a paraphrase of Marshall's ruling in The Schooner Exchange, the last portion of his opinion is clearly applied to the doctrine of exterritoriality. However, Marshall's ruling as to the exemption accorded France's Le Balaou No. 5 was based not upon an application of the doctrine of exterritoriality but upon an application of what will here be called the "doctrine of implied immunities." "The extreme doctrine of exterritoriality was not in issue in Schooner Exchange . . . and neither the principles enunciated by Marshall . . . nor his application of them, appears to support it."[37]

c. The doctrine of exterritoriality rejected. The doctrine of exterritoriality was put in issue six years later in United States v. Bevans, previously discussed. Bevans was convicted by a federal court in Massachusetts for a murder under a federal penal statute which provided, in part

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[37] Chung Chi Cheung v. The King, [1939] A.C. at ______, [1938-40] Ann. Dig. at 267.

> that if any person . . . within any fort, arsenal, dockyard, magazine, or in <u>any other place</u>, or district of country, <u>under the sole and exclusive jurisdiction of the United States</u>, commit the crime of wilful murder, such person . . . , on being thereof convicted, shall suffer death.[38]

The government was represented before the United States Supreme Court by Mr. Henry Wheaton, soon to become American's most eminent publicist. The narrow question before the court was whether or not <u>The Independence</u> while lying in Boston harbor was "any other place . . . under the sole and exclusive jurisdiction of the United States." Wheaton relied heavily upon the doctrine of exterritoriality and the views of Vattel and Casaregis to bolster the government's interpretation of this penal statute. His brief stated, in part, that

> [T]he offence was committed on board a national ship of war, which, together with the space of water she occupies, is <u>extraterritorial</u> . . . when in a port of a foreign country . . . . A national ship is a part of the territory of the sovereign or state to which she belongs. A state [of the Union] has no jurisdiction in the territory of the United States. Therefore it has none in a ship of war belonging to the United States. The exemption of the territory of every sovereign from any foreign jurisdiction, is a fundamental principle of public law. This exemption is extended by comity, by reason, and by justice, to the cases . . . of an army, or fleet, or ship of war marching

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[38] 16 U.S. (3 Wheat.) at 389-90. (Emphasis added.)

> through, sailing over, or stationed in the territory of another sovereign. If a *foreign* sovereign, or his minister, or a foreign ship of war, stationed within the territorial limits of a particular state of the union, is in contemplation of law, extraterritorial and independent of the jurisdiction of that state *a fortiori* must be the army and navy of the *United* States be exempted from the same jurisdiction. If they were not, they would be in a worse situation than those of a foreign power, who are exempt both from the state and national jurisdiction. *Vattel* says that the territory of a nation comprehends every part of its just and lawful possessions. He also considers the ships of a nation *generally portions of its territory* . . . .[39]

The Attorney General argued that

> a public ship of war, as well as the space of water she occupies, . . . being "*a place*" /"/*under the sole and exclusive jurisdiction of the United States;*" it follows that the circuit court of Massachusetts district, had exclusive cognizance of this offence, which was committed out of the jurisdiction of any particular state, and in a place under the sole and exclusive jurisdiction of the United States.[40]

Marshall rejected the arguments of Mr. Wheaton and the Attorney General, reasoning that "the objects with which the word 'place' is associated, are all, in their nature,

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[39] *Id.* at 348-49.

[40] *Id.* at 375.

fixed and territorial"[41] and that when "the words 'other place,' or 'district of country,' were added . . . the context shows the mind of the legislature to have been fixed on *territorial* objects of a similar character."[42]

It is significant to note that Wheaton included in his *International Law* only the statement that Vattel "considers the vessel of a nation *on the high seas*[43] as portions of its territory"[44] and the statement -- citing Casaregis as authority -- that

> A foreign army or fleet, marching through, sailing over, or *stationed in* the territory of another State, with whom the foreign sovereign to whom they belong is in amity, are . . . exempt from the civil and criminal jurisdiction of the place.[45]

Not included by Wheaton in his *International* Law were the following statements of the doctrine of

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[41] *Id.* at 390. (Emphasis added.)

[42] *Id.* at 391. (Emphasis added.)

[43] The "on the high seas" qualification was not made in Wheaton's brief.

[44] WHEATON, INTERNATIONAL LAW § 106, at 142 (8th ed. Dana 1866) (Carnegie Endowment for International Peace "The Classics of International Law" No. 19, 1936) [hereafter cited as WHEATON].

[45] *Id.* § 95, at 128. (Emphasis added.)

exterritoriality set forth in his earlier brief in *United States v. Bevans*:

> [T]he offence was committed on board a national ship of war, which, together with the space of water she occupies, is extraterritorial . . . when in a port of a foreign country . . . . A national ship is a part of the territory of the sovereign or state to which she belongs.[46]

Mr. Cushing's 1855 statement of the doctrine of exterritoriality in *The Sitka* stands almost alone in American law. Occasionally jurists and writers state what superficially appears to be the doctrine. For example, Mr. Justice Gray in his dissent in *Tucker v. Alexandroff*[47] quoted with approval the following statements by Judge Phillimore of the British High Court of Admiralty:

> Long usage and universal custom entitle every such ship *to be considered as* a part of the State to which she belongs, and *to* be exempt from any other jurisdiction . . . .[48]
>
> The *privilege* is extended, by the reason of the thing, to boats, tenders, and all appurtenances of a ship of war.. . . .[49]

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[46] 16 U.S. (3 Wheat.) at 348. [47] 183 U.S. 424 (1901).

[48] *Id.* at 457, citing I PHILLIMORE, INTERNATIONAL LAW 476 (3rd ed. 1889) [hereafter cited as PHILLIMORE].

[49] *Ibid.*, citing I PHILLIMORE 479. (Emphasis added.)

And Mr. Justice Stone in United States v. Flores, previously discussed, stated:

> It is true that the criminal jurisdiction of the United States is in general based on the territorial principle . . . . But that principle has never been thought to be applicable to a merchant vessel which, for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, is deemed to be part of the territory of that sovereignty, and not to lose that character when in navigable waters within the territorial limits of another sovereignty.[50]

And Captain William C. Meese, USN, recently wrote:

> Although the concept that all ships are considered to be a "piece of the territory" of the sovereign whose flag it flies has long been rejected by the international community, it is still accepted and applied to warships and other "public ships" which are engaged solely in the service of the sovereign.[51]

Generally, however, by such language the jurists and writers do not intend to expound the doctrine of exterritoriality but rather to point out that for jurisdictional purposes only an American vessel is being assimilated to American territory. As Barton points out:

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[50] 289 U.S. at 155-56. (Emphasis added.)

[51] JAG J. 7, 8 (March-April 1960).

> The expression [i.e., "the traditional language of exterritoriality] is now used sometimes as a convenient legal abbreviation for jurisdictional immunity, and, if properly understood, no objection can be taken to it.[52]

3. British Commonwealth.

a. The Historicus Letter. In 1875 "a great outcry arose in England when . . . the British Admiralty issued a circular directing captains of the Queen's ships to surrender fugitive slaves who came on board their vessels in the territorial waters of states that authorize slavery."[53] Sir William V. Harcourt, then Whewell Professor of International Law at Cambridge and a Member of Parliament, attacked the Admiralty's instructions in a letter signed "Historicus" to The Times of London stating he had seen

> with much surprise that the doctrine of the absolute immunity of a public ship, and all persons and things on board of it, from local jurisdiction and the operation of the local law when lying in the territorial waters . . . has been treated

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[52] Barton, Foreign Armed Forces: Qualified Jurisdictional Immunity, 31 BRIT. YB. INT'L L. 341, 349 n.4 (1954).

[53] LAWRENCE, INTERNATIONAL LAW § 108, at 231 (7th ed. Winfield 1923) [hereafter cited as LAWRENCE].

> as a doubtful proposition. I had certainly supposed that in the whole range of public law there was no position more firmly established by authority, more universally admitted by Governments, or one which had been more completely accepted in the intercourse of States as unquestioned and unquestionable.[54]

Professor Harcourt unfortunately overstated his case, for, observed Lord Atkin in 1939, the Registrar in Admiralty's report on the controversy "treated the dogmatic assertion of 'Historicus' and his authorities to a merciless dissection to which the conclusions of a Whewell Professor can seldom have been subjected."[55]

b. <u>The Prins Frederik and The Constitution.</u> In 1875, for example, <u>The Prins Frederik</u>[56] furnished a precedent but unfortunately not one supporting the position of "Historicus." The Dutch warship, badly damaged off the Scilly Islands on a return voyage from Batavia

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[54] Chung Chi Cheung v. The King, [1939] A.C. at ____, [1938-40] Ann. Dig. at 267. Professor Twiss of Oxford took the same position. "A ship of war has been termed an extension of the territory of the Nation to which it belongs . . . when it is in a foreign port" and carries "with it a total exemption from the law of the territory." TWISS, LAW OF NATIONS § 158, at 229 (1861).

[55] Chung Chi Cheung v. The King, [1939] A.C. at ____, [1938-40] Ann. Dig. at 268.

[56] 2 Dodson's Adm. Rep. 451 (1820).

to the Texel, was brought into Mount's Bay by the assistance of the master and crew of The Howe, a British brig. When the British salvors applied for salvage services, the Dutch commander treated their application "with undue disregard and defiance."[57] Immediately upon his refusal, a warrant of detainer was sued out of the High Court of Admiralty. Six months later when the case came for hearing before Lord Stowell, then Sir William Scott, Judge of the High Court of Admiralty, the King's Advocate argued, citing The Schooner Exchange,

> that ships of war must be understood to come into ports of a foreign country by consent, which implies a tacit acknowledgment of the privileges necessary for the maintenance of their public character, and amongst others, that of freedom from arrest on civil process.[58]

Lord Stowell acknowledged that the salvors' application for the warrant of detainer had raised "a delicate question of jurisdiction in international law, which the Court was disposed to treat with all necessary caution"[59] and that the court would have released The Prins Frederik

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[57] Id. at 484. [58] Id. at 463-64.

[59] Id. at 484.

on bail "*but without prejudice to the depending question of jurisdiction.*"[60] However, without ever answering this question Lord Stowell proceeded to adjudge 800 plus expenses to the salvors. In fact this "delicate question of jurisdiction in international law" was not answered until four years *after* the Historicus Letter of 1875.

In *The Constitution*,[61] the United States frigate "Old Ironsides"[62] was sailing home from the Paris Exhibition of 1878 heavily laden with machinery when she went aground upon the English coast off Bournemouth and had to be taken off by an English tug. When, however, the tug's owner and the American consul at Portsmouth were unable to agree upon the reasonable value of the salvage services, the owner applied to the High Court of Admiralty for an order to issue a warrant to arrest both *The Constitution* and her cargo. Judge Phillimore held "that there is no doubt as to the general proposition that ships of war belonging to a nation with whom this country is at

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[60] *Id.* at 485. [61] 4 P.D. 39 (1879).

[62] *The USS Constitution* is still a commissioned warship in the United States Navy and is "homeported" at the United States Naval Shipyard, Boston, Massachusetts.

peace are exempt from the civil jurisdiction of this country"[63] and "that in the absence of precedent and principle," he could not issue the warrant.[64]

As in the case of The Schooner Exchange, the exemption recognized in The Constitution was very significant in light of the fact that a territorial State's right under international law to exercise its jurisdiction over crimes committed on board a visiting warship is directly related to a visiting warship's immunities under international law from the exercise of local jurisdiction. Judge Phillimore had earlier written that "the same doctrine would probably be held by the Courts of Great Britain"[65] as had been stated in 1794 by United States Attorney General Bradford, to wit, that "the laws of nations invest the commander of a foreign ship-of-war with no exemption from the jurisdiction of the country into which he comes." Against this background, Judge Phillimore's ruling that The Constitution was "exempt from the civil jurisdiction of" Great Britain was a landmark decision. This was not an unexpected decision

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[63] 4 P.D. at 45. [64] 4 P.D. at 46.

[65] I PHILLIMORE, INTERNATIONAL LAW § 349, at 404 (2d ed. 1871).

for during the Fugitive Slave controversy of 1876 Phillimore was one of the four eminent English jurists who were "agreed in holding that the laws of a state cannot be forcibly executed on board a foreign vessel of war lying in its waters unless by order or permission of the commanding officer."[66]

c. Brown's Case. Even more directly related to the question of the territorial State's right to exercise its jurisdiction over crimes committed on board visiting warships was the issue which concerned Harcourt: the immunity from local jurisdiction of a fugitive slave who managed to reach a British warship visiting in a State permitting slavery. Here Brown's Case[67] furnished a precedent but unfortunately also not one supporting "Historicus."

In 1820 an English sea captain, having commanded a ship involved in a revoluntary affair in the Spanish colonies and having been imprisoned by Spanish authority, escaped and took refuge on The Tyne, a British warship lying in the port of Callao, Peru. The Admiralty asked Lord Stowell, Judge of the High Court of Admiralty

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[66] HALL 244.

[67] I HALLECK, INTERNATIONAL LAW 242 (4th ed. Baker 1908) /hereafter cited as HALLECK/.

> Whether any British subject coming on board any H.M.'s ships of war, in a foreign port and from the judicature of the State within whose territory such port may be situated, is entitled to the protection of the British flag, and to be deemed as within the Kingdom of Great Britain and Ireland?[68]

Lord Stowell answered, in part, that:

> I feel no hesitation in declaring that I know of no such right of protection belonging to the British flag, and that I think such a pretension is unfounded in point of principle, is injurious to the rights of the countries, and is inconsistent with those of our own. The rights of territories are local, and are fixed by known and determined limits. Ships are mere movables, and are treated as such in the general practice of nations. . . . . The common convenience of nations has for certain reasons, and to a certain extent, established in favour of foreign ships of war that they themselves shall not be liable to the civil process of the country in whose ports they are lying, though even the immunity has been occasionally questioned. But that individuals, merely belonging to the same country with the ships of war, are exempt from the civil and criminal process of the country in its ordinary administration of justice by getting on board such ship, and claiming what it called the protection of the flag, is a pretension which, however heard of in practice occasionally, has no existence whatever in principle. If the British flag converts a man-of-war into a British territory, the flag of other nations must be allowed to possess the same property in their marine; for there is no principle whatever that can be appropriated exclusively to the British flag. . . . . I am led to think that the Spaniards

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[68] *Id.* at 243.

> would not have been chargeable with illegal violence if they had thought proper to employ force in taking this person out of the vessel . . . .[69]

Fortunately for Brown, The Tyne's commanding officer refused the Spanish demand for his surrender and brought him home to England, viewing the ship's position more in the light of that advocated by counsel in the 1637 case of The Victory:

> That, as well by the lawe of nations and the seas, as by the use and custome observed and kept, time beyond the memory of man, the ship or shipps of any King or royal fleete lying or arriving within the jurisdiction of any other prince or potentate in league and amity with the King, owner of such shipps or ship royall, ought not to be visited, molested, searched, or questioned, criminally or civilly, by the officers of that prince within whose jurisdiction the said shipps or ship are . . . and by the said lawes and customes, and by the right and power of the imperiall crowne of England his Majesty, and his noble progenitors, Kings of England for times immemoriall, have had the said preminory /sic, qy. preeminence/ and freedom acknowledged and yielded in all ports and havens of princes, their allies, that their royall shipps and ship of any of their royall natives /sic, qy. majesties/ have . . . bin held free, and so acknowledged, from any such arresting, entry, visitation,

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[69] Id. at 243-45. "Lord Castlereagh's instructions to the British minister at Madrid conformed to the above opinion, but Lord Palmerston in 1849 expressed a contrary view." Gregory, Jurisdiction Over Foreign Ships in Territorial Waters, 2 MICH. L. REV. 333, 339 (1904).

> and search, in as full a manner as if they had bin within the ports and havens of their owne dominions.[70]

d. The Cockburn Memorandum. In 1876, following the outcry raised against the Admiralty's fugitive slave circular, a royal commission was appointed to study the immunities from local jurisdiction accorded by international law to a visiting warship and those on board. Unable to agree on what exactly these immunities were, a number of the commission's eminent lawyer-members attached memorandums to its final report. That of Lord Chief Justice, Sir Alexander Cockburn, discussing the whole question of the exterritoriality of a visiting warship, has since been described as "worthy to be compared with the judgment of Marshall" in The Schooner Exchange.[71] After reviewing the conflicting British and Continental precedents[72] and "after controverting

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[70] Adm. Ct. Libels 92 (No. 258), reprinted in I MARSDEN, DOCUMENTS RELATING TO LAW AND CUSTOMS OF THE SEA 496 (No. 1637)(Publications of the Navy Records Society No. 49, 1915).

[71] Chung Chi Cheung v. The King, [1939] A.C. at 172, [1938-40] Ann. Dig. at 267.

[72] "He quoted Casaregis (1740), Discursus de Commercio; Hubner (1759), De la Saisie des Batiments Neutres; Lampredi; Pinheiro-Ferreira; Azuni; Lord Stowell's advice to the British Government in 1820 in Brown's Case;

the view which favour complete exterritoriality, and pointing out the difficulties and, indeed, absurdities, to which the doctrine leads,"[73] the Lord Chief Justice stated:

> The rule which reason and good sense would, as it strikes me, prescribe, would be that, as regards the discipline of a foreign ship, and offences committed on board as between members of her crew towards one another, matters should be left entirely to the law of the ship, and that should the offender escape to the shore, he should, if taken, be given up to the commander of the ship on demand, and should be tried on shore only if no such demand be made. But if a crime be committed on board the ship upon a local subject, or if, a crime having been committed on shore, the criminal gets on board a foreign ship, he should be given up to the local authorities. In whichever way the rule should be settled, so important a principle of international law ought not to be permitted to remain in its present unsettled state.[74]

Wheaton; Hautefeuille, *Des Droits et des Devoirs des Nations Neutres*; Ortolan, *Diplomatie de la Mer*; Bluntschli; Heffter; and Calvo. Of these, Huber, Hautefeuille, Ortolan and Calvo support, in his view, the high doctrine of exterritoriality, Casaregis and Wheaton are noncommittal, the others are against the doctrine." *Id.* at ______, [1938-40] Ann. Dig. at 267-68.

[73] Chung Chi Cheung v. The King, [1939] A.C. at ______, [1938-40] Ann. Dig. at 268.

[74] *Ibid.*

Following the lead of Cockburn, British publicists such as Mr. Hall,[75] Dr. Lawrence,[76] Judge Baker,[77] and Professor Brierly[78] set forth their own reasons for discarding the fiction of exterritoriality. The reasons set forth in Baker's final revision of Major General Halleck's <u>International Law</u> are especially cogent:

> The theory that a ship of war is a continuation of the country to which she belongs, is extra-territorial, and as such is entitled to absolute immunity from foreign law, has been praised by some writers; but it is submitted that 'extra-territoriality' is obviously a fiction, and that it belongs to the well-known class of legal fictions, to the imaginary class of absolute rights, which played an important part in their day, but which, when confronted by facts, had to be qualified by exceptions and distinctions until at last limited and relative doctrines have been substituted for them. Useful, no doubt, the fiction once was in founding a claim for some exemption before the general international status of European States was matured, and no certain custom could be appealed to; but now it serves only the purpose of begging the question that the

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[75] HALL, INTERNATIONAL LAW § 57, at 166 (1st ed. 1880). The reasons set forth here are repeated without change in all eight editions of HALL.

[76] LAWRENCE § 107, at 228.

[77] I HALLECK 232-33.

[78] BRIERLY, THE LAW OF NATIONS 110 (1st ed. 1928).

> ship of war is exempt from the foreign law, the argument being of this kind: Why is the ship exempt from this foreign jurisdiction? Because it is extra-territorial. Why is it extra-territorial? Because it is exempt from all foreign jurisdiction. The fiction of extra-territoriality characteristically denies the essential fact that the ship in the foreign port is within the territorial ambit of another State. It totally ignores the existence of that other State, its inhabitants, its Government, its laws, its interests, its powers, its rights, its duties; indeed, it may be said to ignore all foreign States whatsoever. It ignores the relation of State to State, which is the very thing to be considered. The truth is that jurists habitually resorted to fictions of this nature when they wanted authority for the propositions they desired to lay down. In the facts they saw reasons of convenience or utility, but these they deemed insufficient authority. They therefore created -- presumed -- a contract of a more general character, which seemed to them to furnish the necessary sanctions. Invalid as their general theory was, their conclusions were, of course, often most valuable, and such as later times have more or less fully accepted.[79]

Against this background, when Chung Chi Cheung v. The King -- a murder case with an exterritoriality-type defense -- came before the Judicial Committee of the Privy Council in 1939, the lives of both Cheung and the doctrine of exterritoriality were short-lived.

e. Chung Chi Cheung v. The King. In 1937 Cheung, while serving as a cabin boy on board The Cheung Keng,

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[79] I HALLECK 232-33.

an armed Chinese maritime customs cruiser then in British territorial waters off Hong Kong, killed his captain, wounded the acting chief officer, and then attempted suicide. In response to a signal from The Cheung Keng, the Hong Kong water police boarded her and took Cheung and the surviving officer ashore for hospitalization. An application by China for Cheung's extradition was refused on the ground that he was a British national. Jurisdiction over his crimes was exercised by the Supreme Court of Hong Kong. Cheung's counsel objected that the court lacked jurisdiction but was overruled. Cheung was then tried, found guilty of common law murder and attempted murder, and sentenced to death. His appeal to the Full Court of Appellate Jurisdiction of Hong Kong was dismissed, that court ruling, in part:

> We have set out these quotations at some length as indicating the change in the attitude of international jurists as to the reasoning underlying this universally conceded immunity, and the trend of modern writers towards the opinion that it is a freely accorded waiver by one sovereign state of part of its complete sovereignty. If this opinion is the correct one it necessarily follows that the guest state and the host state have concurrent jurisdiction, but that, as a matter of international comity, the jurisdiction, of the host state is postponed to that

> of the guest state. . . . [The defense counsel's] proposition that the jurisdiction of the visiting state is sole and exclusive is one to which we are unable to accede.[80]

Cheung then appealed to the Privy Council, again contending that the Supreme Court of Hong Kong lacked jurisdiction. Lord Atkin, delivering the Privy Council's opinion, first considered the doctrine of exterritoriality argued on behalf of Cheung. After examining the criticisms of that doctrine by Cockburn, Hall, and Brierly, Lord Atkin concluded:

> Their Lordships have no hesitation in rejecting the doctrine of exterritoriality expressed in the words of Mr. Oppenheim, which regards the public ship 'as a floating portion of the flag-State'. However the doctrine of exterritoriality is expressed, it is a fiction, and legal fictions

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[80] Chung Chi Cheung v. The King, 29 Hong Kong R. 22, 29 (1937), [1938-40] Ann. Dig. 264, 265 (No. 87). (Emphasis added.) There was also here a rather unique situation which made it especially difficult for the court to accede to the defense counsel's proposition. "By the Treaty of Tientsin 1858 the Emperor of China renounced all claim to exercise jurisdiction within his territorial limits over British subjects. The requisition for the surrender of the appellant was doubtless inspired by the belief that the appellant, a person of Chinese parentage, with a Chinese name, and employed on board a Chinese vessel, was a national of China. The moment that the appellant established affirmatively . . . that he was not a national of China proceedings for his extradition failed. The Chinese authorities in effect are claiming to exercise a jurisdiction which they had surrendered in 1858. In these circumstances, if the appellant's plea to the jurisdiction of the Supreme Court of this Colony were upheld, the appellant, so long at least as he remains in Hong Kong, would not be answerable to any Court for the murder which he has committed." 29 Hong Kong R. at 30.

> have a tendency to pass beyond their appointed bounds and to harden into dangerous facts. The truth is that the enunciators of the floating island theory have failed to face very obvious possibilities that make the doctrine quite impracticable when tested by the actualities of life on board ship and ashore. Immunities may well be given in respect of the conduct of members of the crew to one another on board ship. If one member of the crew assault another on board, it would be universally agreed that the local Courts would not seek to exercise jurisdiction, and would decline it unless, indeed, they were invited to exercise it by competent authority of the flag-nation. But if a resident in the receiving State visited the public ship and committed theft, and returned to shore, it is conceivable that when he was arrested on shore and shore witnesses were necessary to prove dealings with the stolen goods and identify the offender, would the local Courts have no jurisdiction? What is the captain of the public ship to do? Can he claim to have the local national surrendered to him? He would have no claim to the witnesses, or to compel their testimony in advance, or otherwise. He naturally would leave the case to the local Courts. But on this hypothesis the crime has been committed on a portion of foreign territory. The local Court has then no jurisdiction, and this fiction dismisses the offender untried and untriable. For it is a commonplace that a foreign country cannot give territorial jurisdiction by consent. . . . . The result of any such doctrine would be not to promote the power and dignity of the foreign sovereign, but to lower them by allowing injuries committed in his public ships . . . to go unpunished.[81]

Atkin then adopted and applied, although not expressly, Marshall's doctrine of implied immunities, stating:

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[81] [1939] A.C. at _____, [1938-40] Ann. Dig. at 269-70.

> The true view is that, in accordance with the conventions of international law, the territorial sovereign grants to foreign sovereigns and their envoys, and public ships and naval forces carried by such ships, certain immunities. Some are well settled; others are uncertain. When the local Court is faced with a case where such immunities come into question, it has to decide whether in the particular case the immunity exists or not. If it is clear that it does, the Court will of its own initiative give effect to it. The sovereign himself, his envoy, and his property, including his public armed ships, are not to be subjected to legal process. These immunities are well settled. In relation to the particular subject of the present dispute, the crew of a warship, it is evident that the immunities extend to internal disputes between the crew. Over offences committed on board by one member of the crew upon another, the local Courts would not exercise jurisdiction. The foreign sovereign could not be supposed to send his vessels abroad if its internal affairs were to be interfered with, and members of the crew withdrawn from its service, by local jurisdiction.[82]

Since Cheung's crimes were "committed on board by one member of the crew," it would seem that "the local Courts would not exercise jurisdiction." But in fact the Supreme Court of Hong Kong did exercise jurisdiction and the Privy Council approved that exercise of jurisdiction. How this result was reached requires fairly close analysis.

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[82] *Id.* at ______, [1938-40] Ann. Dig. at 270-71. (Emphasis added.)

Cheung's appeal was based on the doctrine of exterritoriality: that his alleged crimes were committed, according to international law,[83] on Chinese territory -- a "floating portion of the [*Cheung Kong's*] flag-State" -- over which China had the sole and *exclusive* jurisdiction and over which Great Britain had *no* territorial jurisdiction. Atkin's decision, on the other hand, was based on the doctrine of implied immunities, the significance of which was "that the guest state and the host state have concurrent jurisdiction"[84] over Cheung's crimes. From this jurisdictional basis, Atkin reasoned that "the Chinese Government could clearly have had [*i.e.*, exercised its] jurisdiction over the offense," that "though the offender had, for reasons of humanity, been taken to a local hospital, a diplomatic request for his surrender would appear to have been in order. . . . but this request was never made," that "the immunities which the local Courts recognize flow from a waiver by the local sovereign of

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[83] *E.g.*, "Crimes committed on board by persons in the service of the vessel are under the *exclusive* jurisdiction of the commander and the other home authorities." I OPPENHEIM, INTERNATIONAL LAW § 450, at 667 (5th ed. Lauterpacht 1937). (Emphasis added.)

[84] 29 Hong Kong R. at 29, [1938-40] Ann. Dig. at 265.

his full territorial jurisdiction, and can themselves be waived," "that the Chinese Government, once the extradition proceedings were out of the way, consented to the British Court exercising jurisdiction," that "not only . . . with full knowledge of the proceedings they made no further claim, but at two different dates they permitted four members of their service to give evidence before the British Court in aid of the prosecution," that "the circumstances stated, together with the fact that the material instruments of conviction, the revolver bullets, etc., were left without demur in the hands of the Hong Kong police, make it plain that the British Court acted with the full consent of the Chinese Government," and "that it therefore follows that there was no valid objection to the jurisdiction, and the appeal fails."[85]

The decisions of the Full Court of Appellate Jurisdiction of Hong Kong and of the Privy Council in Chung Chi Cheung v. The King were especially significant for four reasons. First, these decisions rejected the doctrine of exterritoriality along with its concomitant

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[85] [1939] A.C. at ______, [1938-40] Ann. Dig. at 271-72.

rule that the visiting State has exclusive jurisdiction over crimes committed on board its warships. Second, they adopted the doctrine of implied immunities along with its concomitant rule that the visiting and territorial States have concurrent jurisdiction over such crimes. Third, they distinguished between jurisdiction over crimes and the right to exercise that jurisdiction. And fourth, they emphasized that the territorial State's implied waiver of its right to exercise its jurisdiction over crimes committed on board visiting warships is a conditional waiver and that the territorial State may exercise its jurisdiction over such crimes in the event the visiting State either waives its immunity from or consents to the territorial States exercise of that jurisdiction. Atkin set forth all four of these "points" -- either expressly or impliedly -- in the following two quotations:

> On the question of jurisdiction two theories have found favour with persons professing a knowledge of the principles of international law. One is that a public ship of a nation for all purposes either is, or is to be treated by other nations as, part of the territory of the nation to which she belongs. By this conception will be guided the domestic law of any country in whose territorial waters the ship finds herself. There will therefore be no jurisdiction in fact in any Court where jurisdiction depends upon the act in question, or the party to the proceedings, being done or found or resident in the local

> territory. The other theory is that a public ship in foreign waters is not, and is not treated as, territory of her own nation. The domestic Courts, in accordance with principles of international law, will accord to the ship and its crew and its contents certain immunities, some of which are well settled, though others are in dispute. In this view, the immunities do not depend upon an objective exterritoriality, but on implication of the domestic law. They are conditional, and can in any case be waived by the nation to which the public ship belongs. Their Lordships entertain no doubt that the latter is the correct conclusion.[86]

> Here is no question [the visiting State] saying [to the territorial State] you may treat an offence committed on my territory as committed on yours. Such a statement by a foreign sovereign would count for nothing in our jurisprudence. But a sovereign may say, you have waived your jurisdiction in certain cases, but I prefer in this case that you should exercise it. The original jurisdiction in such a case flows afresh.[87]

f. Exemption of United States forces in Canada. In 1942, three years after the Privy Council's decision in Chung Chi Cheung v. The King, the Governor General in Council asked the Canadian Supreme Court in Reference As To Whether Members Of The Military Or Naval Forces Of The United States Of America Are Exempt From Criminal Proceedings In Canadian Criminal Courts[88] for its opinion

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[86] Id. at ______, [1938-40] Ann. Dig. at 266.

[87] Id. at ______, [1938-40] Ann. Dig. at 271.

[88] [1943] Can. Sup. Ct. 483, [1943] 4 D.L.R. 11 (1943), [1943-45] Ann. Dig. 124 (No. 36) [hereafter referred to and cited as Exemption of United States Forces].

on the following question:

> Are members of the military or naval forces of the United States of America who are present in Canada with the consent of the Government of Canada for purposes of military operations in connection with or related to the state of war now existing exempt from criminal proceedings prosecuted in Canadian criminal courts and, if so, to what extent and in what circumstances?[89]

The five-member court rendered three opinions on this question, all applying the doctrine of implied immunities but differing as to what immunities were implied under the circumstances.

Justices Kerwin and Tascherau were of the opinion that all members of the United States forces, whether "on duty or on leave,"[90] were immune from the exercise by Canada of its jurisdiction over their crimes, a position considerably broader -- when considered in a shipboard context -- than that taken by Lord Atkin. Both judges, however, agreed with Atkin that

> this immunity may be waived by the United States in any particular case, in which event the courts of Canada would not be without jurisdiction to try a member of a United States force for an offence alleged to have been committed against our laws.[91]

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[89] *Id.* at 487, [1943] 4 D.L.R. at 12-13, [1943-45] Ann. Dig. at 124.

[90] *Id.* at 509, 518, [1943] 4 D.L.R. at 33, 42, [1943-45] Ann. Dig. at 128.

[91] *Id.* at 509-10, 518, [1943] 4 D.L.R. at 34, [1943-45] Ann. Dig. at 129.

Mr. Chief Justice Duff and Mr. Justice Hudson took a position as to crimes committed on board visiting United States warships which was substantially the same as that taken by Atkin, to wit:

> The members of a crew of an armed ship of the United States are exempt from the jurisdiction of the criminal courts of Canada in respect of an offense committed on board ship by one member of the crew against another member of the crew and generally in respect of acts which exclusively concern the internal discipline of the ship.[92]

Mr. Justice Rand, the fifth court member, took a position which was also substantially the same as that taken by Atkin, to wit:

> The members of United States forces are exempt from criminal proceedings in Canadian courts for offences under local law committed . . . on their warships, except against persons not subject to United States service law, or their property, . . . but the exemption is only to the extent that United States courts exercise jurisdiction over such offences.[93]

From the above opinions it is clear that all of the justices were of the opinion that, under international law, a member of the United States armed forces

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[92] *Id.* at 501, [1943] 4 D.L.R. at 25, [1943-45] Ann. Dig. at 125.

[93] *Id.* at 527, [1943] 4 D.L.R. at 51, [1943-45] Ann. Dig. at 125.

would be immune from criminal proceedings in the Canadian courts for a crime committed on board a United States warship against another member of the United States armed forces. On the other hand, a majority of the court -- three justices -- were of the opinion that there was no such immunity concerning a crime committed against a local civilian. In this regard The Chief Justice wrote:

> I do not think Sir Alexander Cockburn had any doubt about the jurisdiction of the local courts in such a case, and it is possible Lord Atkin's sentence, standing in its context, ought to be read as restricted to offences committed by one member of the crew against another. In such a case, assuming there was no legislation dealing with the matter, and assuming the offence was not murder or one of like gravity, it is probable that the local jurisdiction would recognize [i.e., extend international courtesy to] the disciplinary jurisdiction of the ship. The question we are asked, however, is a question relating to jurisdiction; and . . . I think . . . the offender is not in point of law exempt from local jurisdiction.[94]

4. North Atlantic Treaty Organization.

a. The NATO Status of Forces Agreement. In 1951, all but one[95] member of the North Atlantic Treaty Organization -- Belgium, Canada, Denmark, France, Germany, Greece, Italy, Luxembourg, the Netherlands,

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[94] Id. at 499-500, [1943] 4 D.L.R. at 23-24, [1943-45] Ann. Dig. at 128.

[95] Not signed by Iceland, also a NATO member.

Norway, Portugal, Turkey, United Kingdom, and the United States -- signed an agreement concerning the status of their armed forces while visiting in each other's territory.[96] An important part of the NATO Status of Forces Agreement is an article which defines the rules of jurisdiction over crimes committed by the armed forces of a visiting ("sending") NATO-member State within the territory of a ("receiving") NATO-member state.[97]

As an *international agreement*, the NATO Status of Forces Agreement is binding upon its signatory States. But does the agreement also constitute either *evidence* of or a *source* of rules of jurisdiction under *international law* which are binding on all States? The opinions

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[96] Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67, 109, 48 AM. J. INT'L L. SUPP. 83 (1954) /hereafter referred to and cited as the NATO Status of Forces Agreement/. See generally Re, *The NATO Status of Forces Agreement and International Law*, 50 NW. U.L. REV. 349 (1955), Schwartz, *International Law and the NATO Status of Forces Agreement*, 53 COLUM. L. REV. 1091 (1953).

[97] See generally, SNEE & PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION (1957).

and observations of publicists as to what *are* -- not should be -- the rules of international law,[98] together with the decisions of national courts and international tribunals[99] constitute *evidence* of what are the rules of international law. On the other hand, international custom,[100] general principles of law,[101]

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[98] "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be made to the customs and usages of civilized nations; and as *evidence* of these, to the *works* of jurists and *commentators, who by years of labour, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat*. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthly evidence of what the law really is." The Paquete Habana, 175 U.S. 677, 700 (1900). (Emphasis added.)

[99] The Statute of the International Court of Justice provides that the court "shall apply . . . judicial decisions . . . as subsidiary means for determination of rules of law." STAT. INT'L CT. JUST. art. 38, para 1. "When any system of law has reached a stage at which it is thought worth while to report the decisions and the reasoning of judges, other judges inevitably give weight, though not necessarily decisive weight, to the work of their predecessors." BRIERLY 64.

[100] STAT. INT'L CT. JUST. art. 38, para. 1. Kopelmanas, *Custom as a means of the Creation of International Law*, 18 BRIT. YB. INT'L L. 127 (1937), Kunz, *Nature of Customary International Law*, 47 AM. J. INT'L L. 662 (1953).

[101] Republic of Panama v. Schwartzfiger, Panama Supreme Court, Aug. 18, 1926, 24 OFFICIAL JUDICIAL REGISTRAR 772, ______ (1926), 21 AM. J. INT'L L. 182, 183 (1927).

reason,[102] and some *international agreements* constitute *sources* of the rules of international law. As to international agreements, Brierly makes the following qualifications and comments:

> The *only* class of treaties which it is admissible to treat as a *source* of *general law* are those which a *large number of states* have concluded for the purpose either of declaring their understanding of what the law is on a particular subject, or of laying down a new general rule for future conduct . . . . Such treaties are . . . the substitute in the international system for legislation, and they are conveniently referred to as 'law-making' . . . .[103]

b. *Exclusive and concurrent jurisdiction*.

(1) *Exclusive jurisdiction*.

(a) *Sending State*. The NATO Status of Forces Agreement recognizes that a sending State has exclusive jurisdiction over crimes committed by members of its armed forces, "including offences relating to its security, punishable by the law of the sending State,

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[102] "[N]o system of law consists only of formulated rules, for these can never be sufficiently detailed or sufficiently foreseeing to provide for every situation that may call for a legal decision; those who administer law must meet new situations not precisely covered by a formulated rule by resorting to the principle . . . which we generally call *reason*. . . . . *This source of* new rules is accepted as valid and is constantly resorted to in the practice of states, both in the decisions of international tribunals and in legal arguments conducted by foreign offices with one another, ..." BRIERLY 66-67. (Emphasis added.)

[103] BRIERLY 58. (Emphasis added.)

but *not* by the law of the receiving State."[104] "The internal discipline of the [sending State's] forces with respect to purely military offenses remains, therefore, unaffected by the Status of Forces Agreement."[105] For example, the United States as a sending State has *exclusive* jurisdiction over such purely military offenses as desertion,[106] false official statements,[107] and misbehavior of a sentry by sleeping on post.[108]

(b) *Receiving State*. The agreement also recognizes that a receiving State has *exclusive* jurisdiction over crimes committed by members of a sending State's armed forces, "including offences relating to the security of that [the receiving] State, punishable by its law but *not* by the law of the sending State."[109] Where

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[104] Art. VII, para. 2(a). (Emphasis added.)

[105] Rouse & Baldwin, *The Exercise of Criminal Jurisdiction Under The NATO Status of Forces Agreement*, 51 AM. J. INT'L L. 29, 38 (1957).

[106] UCMJ, art. 85. [107] UCMJ, art. 89.

[108] UCMJ, art. 113.

[109] Art. VII, para. 2(b). (Emphasis added.)

the United States is the sending State, however, the receiving State's exclusive jurisdiction is quite limited[110] because many otherwise purely local crimes are also either "disorders and neglects to the prejudice of good order and discipline in the armed forces" or "conduct of a nature to bring discredit upon the armed forces," both being military crimes punishable under the UCMJ.[111]

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[110] "Few offenses fall within the exclusive jurisdiction of the receiving state if it can be established that the violation of local law constitutes conduct of such a nature as to bring discredit on the armed forces chargeable under Article 134 of the Uniform Code of Military Justice." Rouse & Baldwin, *The Exercise of Criminal Jurisdiction Under The NATO Status of Forces Agreement*, 51 AM. J. INT'L L. 29, 38 (1957).

[111] "/A/n act which is a violation of . . . a foreign law *may* constitute a disorder or neglect to the prejudice of good order and discipline or conduct of a nature to bring discredit upon the armed forces and so be punishable under the first or second clause of Article 134 /UCMJ/." MCM, 1951, para. 213*c*. (Emphasis added.) "It is clear, however, that not every violation of a . . . foreign law is per se an offense in violation of Article 134 (see 1st Indorsement of Judge Advocate General of the Army to CM 288584, Roach, 56 BR 381, 394). It takes little imagination to conceive of violations of local law, whether state or foreign, which would neither prejudice good order and military discipline, or /sic/ bring discredit upon the armed forces." ACM 5636, Hughes, 7 CMR 803, 811 (1953). *E.g.*, United States v. Grosso, 7 USCMA 566, 23 CMR 30 (1957), ACM S-5504, Wolverton, 10 CMR 641 (1953). An act which is a violation of a foreign law may also constitute "conduct unbecoming an officer and a gentleman" and so be punishable under Article 133, UCMJ. *E.g.*, ACM 8289, Peterson, 16 CMR 565 (1954), *petition for review denied*, 16 CMR 292 (1954).

(2) *Concurrent jurisdiction*. The NATO Status of Forces Agreement also recognizes that sending and receiving States have *concurrent* jurisdiction over crimes committed by members of the sending State's armed forces which are punishable by laws of both States.[112] Rouse and Baldwin state that "Article VII of the NATO Status of Forces Agreement established a pattern of concurrent criminal jurisdiction."[113] This pattern is "established" by rejecting the doctrine of exterritoriality as follows:

> The authorities of the receiving State shall have jurisdiction over the members of a force . . . with respect to offences committed within the territory of the receiving State and punishable by the law of that State.[114]

Thus the sending and receiving[115] States have *concurrent* jurisdiction over most serious common law-type crimes committed either on board a sending State's visiting warship or by members of a visiting naval force ashore.

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[112] Art. VII, paras. 1,3.

[113] Rouse & Baldwin, *The Exercise of Criminal Jurisdiction Under The NATO Status of Forces Agreement*, 51 AM. J. INT'L L. 29, 31 (1957).

[114] Art. VII, para. 1(b).

[115] "'[R]eceiving State' means the Contracting Party in the territory of which the force . . . is located, whether it be stationed there or passing in transit." NATO Status of Forces Agreement, art. I, para. e.

d. Right to exercise exclusive and concurrent jurisdiction.

(1) Exclusive jurisdiction.

(a) Sending State. A sending State has the right under international law to exercise its exclusive jurisdiction within its own home territory and on the high seas. On the other hand, it's right to exercise its exclusive jurisdiction within a receiving State's territory is narrowly limited by international law. The NATO Status of Forces Agreement confers on a sending State the right to exercise its exclusive jurisdiction within a receiving State's territory but subject to the following two limitations:

> Subject to the provisions of this Article /VII/ . . . the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State.[116]

> A death sentence shall not be carried out in the receiving State by the authorities of the sending State if the legislation of the receiving State does not provide for such punishment in a similar case.[117]

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[116] Art. VII, para. 1(a).

[117] Art. VII, para. 7(a).

(b) *Receiving State*. Under international law a receiving State has the right to exercise its exclusive jurisdiction within its own territory. Since it has no need to exercise its exclusive jurisdiction elsewhere, the NATO Status of Forces Agreement contains no substantive provisions on this right.[118]

(2) *Concurrent jurisdiction*.

(a) *Sending State*. A sending State has the right under international law to exercise its concurrent jurisdiction within its own home territory and on the high seas. On the other hand, it's right to exercise its *concurrent* jurisdiction within a receiving State's territory is even *more* narrowly limited by international law than is it's right to exercise its *exclusive* jurisdiction similarly. The NATO Status of Forces Agreement confers on a sending State the right to exercise its concurrent jurisdiction within a receiving State's territory but subject not only to the same two limitations -- listed above -- which also limit its right to

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[118] It does contain a number of procedural provisions. *E.g.*, "The custody of an accused member of a force . . . over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State." Art. VII, para. 5(c).

exercise its exclusive jurisdiction, but in addition to the following important limitation: that the receiving State has the *primary* right to exercise its concurrent jurisdiction over *all* crimes but the following two types:

(i) offences solely against the property or security of that [the sending] State, or offences *solely* against the persons or property of another member of the force or civilian component of that State or of a dependent;[119]

(ii) offences arising out of any act or omissions *done in the performance of official duty.*[120]

(b) *Receiving State.* A receiving State has the right under international law to exercise its

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[119] NATO Status of Forces Agreement, art. VII, para. 3(a). (Emphasis added.) "[A] security offence against a State shall include (i) treason against the State; (ii) sabotage, espionage or violation of any law relating to the national defence of that State." *Id.* art. VII, para. 2(c).

[120] *Id.* art. VII, para. 3(a). (Emphasis added.) "[T]he express language of paragraph 3(a) (ii) of Article VII . . . limits such offenses to those committed in the course of the *performance of official duty.* It clearly requires something more than that the offense was committed during the period while the accused was *on* official duty. This additional ingredient is a causal connection between the offense committed and an act or ommission [sic] done in the performance of official duty." Ellert, *The United States as a Receiving State*, 63 DICK. L. REV. 75, 89 (1959). See Baldwin, *Foreign Jurisdiction and the American Soldier*, 1958 WIS. L. REV. 52, for a review of official duty determination problems. See also, Wilson v. Girard, 354 U.S. 524 (1957).

concurrent jurisdiction within its own territory "but only in accordance with the limits imposed by international law regarding the exercise of that jurisdiction."[121] Under the NATO Status of Forces Agreement "the authorities of the receiving State . . . have the *primary* right to exercise [its *concurrent*] jurisdiction" over all classes of crimes except those two classes over which the sending State has the primary right.[122]

B. *RULES OF JURISDICTION.*

1. *Jurisdiction Over Crimes Committed on Board Visiting Warships.*

a. *Exclusive jurisdiction.*

(1) *Visiting State.* Under international law a visiting State has *exclusive* jurisdiction over all crimes, punishable by its law but not by the territorial State's law, which are committed in whole or in part on board its visiting warships.[123] The term "warships" includes "boats, tenders, and all appurtenances of a ship of war."[124]

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[121] Anne v. Ministere Public, Mixed Court of Cassation, Dec. 13, 1943, 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 52, 54 (1944-45), [1943-45] Ann. Dig. 115, 118 (No. 33).

[122] Art. VII, para. 3(b).

[123] NATO Status of Forces Agreement, art. VII, para. 2(a), *Jurisdiction With Respect to Crime*, art. 4, 439.

[124] I PHILLIMORE § 346, at 479.

(2) *Territorial State.* Under international law a territorial State has *exclusive* jurisdiction over all crimes, punishable by its law but not by the visiting State's law, which are committed in whole or in part on board a visiting State's warships.[125]

b. *Concurrent jurisdiction.* Under international law visiting and territorial States have *concurrent* jurisdiction over all crimes, punishable by the laws of both States, which are committed in whole or in part on board a visiting State's warships.[126]

2. *Right to Exercise Jurisdiction Over Crimes Committed on Board Visiting Warships.*

a. *Crimes over which the visiting State has exclusive jurisdiction.* Under international law a State has the right to exercise within its own home territory and on the high seas its exclusive jurisdiction over crimes committed in whole or in part on board its visiting warships. On the other hand, under international

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[125] NATO Status of Forces Agreement, art. VII, para. 2(b).

[126] Chung Chi Cheung v. The King, [1939] A.C. 160, [1938-40] Ann. Dig. 264 (No. 87), Exemption of United States Forces, [1943] Can. Sup. Ct. 483, [1943] 4 D.L.R. 11 (1943) [1943-45] Ann. Dig. 124 (No. 36), NATO Status of Forces Agreement, art. VII, para. 1, *Jurisdiction With Respect to Crime*, arts. 3, 4, 439-40.

law a visiting State has generally no right to exercise such jurisdiction within the territorial State for "a state's jurisdiction to take enforcement action within its territory is normally exclusive."[127] States may, of course, enter into international agreements -- as the member States of the North Atlantic Treaty Organization have done[128] -- which expressly confer on a sending State the right, limited or unlimited, to exercise within a territorial State its -- the sending State's -- exclusive jurisdiction over crimes committed within the territorial State.

Under international law, however, there are a few exceptional situations wherein a territorial State is deemed to have conferred on a visiting State a limited right to exercise within its territory its -- the visiting State's -- exclusive jurisdiction over crimes committed within the territorial State.[129] One such situation is where a territorial State gives its consent, express or implied, to the visit of another State's warships within its territory. Unless the territorial

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[127] RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 20, comment b at 64 (Prop. Off. Draft, 1962) /hereafter cited as RESTATEMENT/.

[128] NATO Status of Forces Agreement, art. VII, paras. 1(a), 2(a).

[129] RESTATEMENT § 20, comment b at 64.

State expressly indicates otherwise, international law deems that the territorial State impliedly confers on the visiting State a _limited_ right to exercise within its territory its -- the visiting State's -- _exclusive_ jurisdiction over crimes committed in whole or in part on board these visiting warships.[130]

The visiting State's right to exercise within the territorial State its exclusive jurisdiction over crimes committed on board its visiting warships is subject to the following three limitations:

(1) This jurisdiction may be exercised only on board the visiting State's warships.[131]

(2) This jurisdiction may be exercised only against members of the visiting State's armed forces.[132]

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[130] _Id._ § 52(b) at 176.

[131] "The laws and discipline of the sending state may be enforced on board a foreign public ship by court martial or otherwise, without infringing the sovereignty of the territorial state . . . ." BRIERLY 268; _accord_, SNOW, INTERNATIONAL LAW § 16, at 24 (2d ed. Stockton 1898), RESTATEMENT § 32, at 92; _cf_. The Schooner Exchange, 11 U.S. (7 Cranch) 116, 140 (1812) (dictum), Exemption of United States Forces, [1943] Can. Sup. Ct. 483, 524, [1943] 4 D.L.R. 11, 48 (1943), [1943-45] Ann. Dig. 124, 131-32 (No. 36).

[132] "A state has jurisdiction, as to rules within its jurisdiction to prescribe, to enforce them (a) abroad

(3) This jurisdiction may be exercised to inflict only noncapital punishments if the territorial State does not provide for capital punishment in similar cases.[133]

Jurisdiction over crimes committed on board warships is most frequently exercised by means of non-judicial type disciplinary proceedings.[134] However, this jurisdiction may be exercised by any one of the various types of judicial proceedings authorized by the visiting State's laws.[135]

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a vessel . . . having its nationality while under the control of its commanding officer; and (b) against a member of its military forces." RESTATEMENT § 32, at 92-93; *cf.* The Schooner Exchange, 11 U.S. (7 Cranch) 116, 140 (1812)(dictum), Exemption of United States Forces, [1943] Can. Sup. Ct. 433, 524, [1943] 4 D.L.R. 11, 48 (1943), [1943-45] Ann. Dig. 124, 131-32 (No. 36).

[133] NATO Status of Forces Agreement, art. VII, para. 7(a); *accord*, "The exercise, by the state of the vessel, of the enforcement jurisdiction that it has under the rule stated in § 32 . . . . does not include the inflicting of major punishment such as the death penalty." RESTATEMENT § 52, comment *e* at 177. *Contra*, SNOW, INTERNATIONAL LAW § 16, at 24 (2d ed. Stockton 1898); *cf.* The Schooner Exchange, 11 U.S. (7 Cranch) 116, 140 (dictum).

[134] *E.g.*, UCMJ, art. 15, entitled, "Commanding Officer's non-judicial punishment."

[135] BRIERLY 268. *Contra*, "The exercise . . . of the enforcement jurisdiction is limited to . . . the inflicting of minor punishment or the holding of summary courts martial." RESTATEMENT § 52, comment *e* at 177.

b. Crimes over which the territorial State has exclusive jurisdiction. Under international law the territorial State has the right to exercise within its territory its exclusive jurisdiction over crimes committed on board a visiting warship subject to one limitations: this jurisdiction may not be exercised on board the visiting warship. In fact, "no official of the territorial State is permitted to board the vessel against the wishes of her commander."[136] As Hyde observes:

> At the present time a foreign vessel of war and the occupants thereof are acknowledged to be exempt from local process. . . . . No occupant while remaining on board the vessel is subject to the local jurisdiction, not withstanding his infraction of the local criminal code by an act committed on shore or taking effect there.[137]

If the territorial State is able to apprehend the offender ashore, then it can exercise its exclusive jurisdiction over his shipboard crime. If, on the other hand, the offender remains on board his warship, the territorial State may have considerable difficulty in exercising its jurisdiction. What might the territorial State do to exercise its jurisdiction over this shipboard

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[136] COLOMBOS § 279, at 242; accord, I OPPENHEIM § 450, at 853-54.

[137] II HYDE § 253, at 826-27; accord, BRIERLY 268-69.

crime? First, since "immunity from the local jurisdiction may . . . be waived,"[138] the territorial State may seek permission from the visiting warship's commander to arrest the offender, to serve him with criminal process, or to have him surrendered up and delivered into territorial State custody. In this regard Hyde states:

> [The territorial State] may not unreasonably request of the commander . . . the surrender of an inmate whose conduct has wrought grave harm ashore in violation of the local criminal law.[139]

While Hyde notes that "this is the more obvious when the act complained of is committed outside of the vessel,"[140] still there could be circumstances in which the act complained of was committed on board the vessel. Second, the territorial State may make a diplomatic request for the offender's surrender or exercise its rights under any treaty of extradition[141] it might have with the

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[138] II HYDE § 253, at 827.

[139] Ibid. [140] Id. § 253, at 827 n.7. (Emphasis added.)

[141] "Extradition" has been defined as "the surrender by one nation to another nation of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender." Terlinden v. Ames, 184 U.S. 270, 289 (1902). "The principles of international law recognize no right to extradition apart from treaty." Factor v. Laubenheimer, 290 U.S. 276, 287 (1933).

visiting State. Last, if its municipal laws permit, the territorial State may try the offender *in absentia*, a procedure quite common in countries with a Civil Law tradition.[142]

c. *Crimes over which the visiting and territorial States have concurrent jurisdiction.*

(1) *Right of the visiting State.* Where a territorial State gives its consent, express or implied, to the visit of another State's warships within its territory, unless the territorial State expressly indicates otherwise, international law deems that the territorial State impliedly confers on the visiting State a limited right to exercise within its territory its -- the visiting State's -- *concurrent* jurisdiction over crimes committed on board these visiting warships.

The visiting State's right to exercise its concurrent jurisdiction over crimes committed on board its visiting warships is subject to the same three limitations upon its right to exercise its *exclusive* jurisdiction. In addition, this right is also subject to the following important limitation: that the territorial State has the *primary* right to exercise its *concurrent* jurisdiction over all crimes committed on board visiting warships except for the following three

types of crimes committed by members of the visiting State's armed forces or by civilians who are attached to or embarked in a visiting warship:

(i) Crimes solely against the property or security of the visiting State.

(ii) Crimes solely against the persons or property of other members of the visiting State's armed forces or of civilians who are attached to or embarked on a visiting warship.

(iii) Crimes arising out of any act or omissions done in the performance of official duty.

The visiting State may, of course, expressly or impliedly waive its primary right to exercise its concurrent jurisdiction over the three previously mentioned types of crimes committed on board its visiting warships "and if this is done, then, to borrow the expression of Lord Atkin, 'the original /right to exercise/ jurisdiction of the receiving sovereign flows afresh'."[143] An implied waiver results, for example, where the visiting

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[143] Exemption of United States Forces, /1943/ Can. Sup. Ct. at 518, /1943/ 4 D.L.R. at 42.

State fails to request surrender of the offender who is being held by the territorial State.[144] This was the holding in *Chung Chi Cheung v. The King* which Mr. Justice Taschereau later summarized as follows:

> The murder [of the ship's captain by the cabin boy] had been committed on board a Chinese armed public ship in the territorial waters of Hong Kong. It was held that the immunities [*i.e.*, visiting State's primary right to exercise its concurrent jurisdiction over certain crimes committed on board its warships] granted are conditional and can themselves be waived by the nation to which the ship belongs. The Chinese Government not having made a request for the surrender of the accused, the [concurrent] jurisdiction of the British court was held to have been validly exercised.[145]

One important reason for the application of the doctrine of waiver in this field of international law is to militate against jurisdictional vacuums. Thus Mr. Justice Rand observed:

> The principle enunciated in the *Schooner Exchange* [*i.e.*, "The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and

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[144] Chung Chi Cheung v. The King, [1939] A.C. at ____, [1938-40] Ann Dig. at 271-72, Exemption of United States Forces, [1943] Can. Sup. Ct. at 509-10, 518, 526, [1943] 4 D.L.R. at 33-34, 42, 50, [1943-45] Ann. Dig. at 125, 130, 133, Cockburn Memorandum, quoted in Chung Chi Cheung v. The King, [1939] A.C. at ____, [1938-40] Ann. Dig. at 268, and in Exemption of United States Forces, [1943] Can. Sup. Ct. at 498, [1943] 4 D.L.R. at 22, [1943-45] Ann. Dig. at 127.

[145] Exemption of United States Forces, [1943] Can. Sup. Ct. at 515 [1943] 4 D.L.R. at 39, [1943-45] Ann. Dig. at 130.

> permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require."] has as a necessary corollary the implied obligation on the foreign court to accept that responsibility. The principle of immunity laid down in the case of *Chung Chi Cheung v. The King* is that the local jurisdiction withdraws before the assertion of jurisdiction by the foreign authority: if the latter fails to make that assertion, it must be taken as waiving it and in such a case the local processes are considered not to have been displaced. . . . *In such a conception, an act in violation of the local law is not permitted an escape, jurisdictionally, from appropriate juridical action.*"[146]

(2) *Right of the territorial State.* Under international law the territorial State has the right to exercise within its territory its concurrent jurisdiction over crimes committed on board a visiting warship subject to the same limitation upon its right to exercise its exclusive jurisdiction, to wit: this jurisdiction may *not* be exercised on board the visiting warship. In addition, this right is also subject to the following important limitation: that the visiting State has the *primary* right to exercise its *concurrent*.

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[146] Exemption of United States Forces, [1943] Can. Sup. Ct. 483, 526, [1943] 4 D.L.R. 11, 30 (1943), [1943-45] Ann. Dig. 124, 133 (No. 36). (Footnotes omitted and emphasis added.)

jurisdiction over the previously mentioned three types of crimes committed on board visiting warships by members of the visiting State's armed forces or by civilians who are attached to or embarked in a visiting warship.

The territorial State's *primary* right to exercise its *concurrent* jurisdiction over *all* but these previously mentioned three types of crimes may, of course, be expressly or impliedly waived. An implied waiver results, for example, where the territorial State fails to request surrender of the offender who is being held by the visiting State on board its warship.[147]

(3) *Illustrations of the rules of concurrent jurisdiction.*

\# 1 An officer of a visiting warship steals a ship's chronometer. The visiting State has the primary right to exercise its concurrent jurisdiction over the crime.[148]

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[147] *Cf.* United States v. Flores, 289 U.S. 130 (1933).

[148] *E.g.*, NATO Status of Forces Agreement, art. VII, para. 3(a) (i), Institute of International Law, *Regulations Concerning the Legal Status of Ships and Their Crews in Foreign Ports*, art. 16, para. 1 (Aug. 23, 1898), 17 ANNUAIRE DE L'INSTITUTE DE DROIT INTERNATIONAL 277 (1898), RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 147 (Scott ed. 1916); *cf.* United States v. Thierichens, 243 Fed. 417 (E.D. Penn. 1917)(commanding officer of interned German cruiser *The Prinz Eitel Friedrich* indicted for smuggling chronometers off his warship).

#2 A member of the crew of a visiting warship steals from the ship three documents classified "Restricted Data" with the intent of selling them to an agent of State A. The visiting State has the primary right to exercise its concurrent jurisdiction over the crime.[149]

#3 A member of the crew of a visiting warship shoots and kills the ship's commanding officer. The visiting State has the primary right to exercise its concurrent jurisdiction over the crime.[150]

#4 A member of the crew of a visiting warship steals the navigator's personal chronometer. The visiting State has the primary right to exercise its concurrent jurisdiction over the crime.[151]

#5 A member of the crew of a visiting warship while posted as a bow sentry unlawfully shoots and kills a territorial State national who has come alongside in a sampan and is stealing tools from one of the warship's small boats, the sentry believing that such force was justified to protect government property.[152]

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[149] *Ibid.* See generally, United States v. French, 10 USCMA 171, 27 CMR 245 (1959).

[150] *E.g.*, Chung Chi Cheung v. The King, [1939] A.C. 160, [1938-40] Ann. Dig. 264 (No. 87), NATO Status of Forces Agreement, art. VII, para 3(a)(i), Institute of International Law, *Regulations Concerning the Legal Status of Ships and Their Crews in Foreign Ports*, art. 16, para. 1 (Aug. 23, 1898), 17 ANNUAIRE DE L'INSTITUTE DE DROIT INTERNATIONAL 277 (1898), RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 147 (Scott ed. 1916).

[151] *Ibid.*

[152] *E.g.*, NATO Status of Forces Agreement, art. VII, para. 3(a)(ii), Institute of International Law, *Regulations Concerning the Legal Status of Ships and Their Crews in Foreign Ports*, art. 16, para. 1, Aug. 23, 1898, 17 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 277 (1898), SCOTT, RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 147 (1916), I OPPENHEIM § 450, at 845. See generally Peck, *The Use of Force to Protect Government Property*, 26 MIL. L. REV. 81 (1964)(DA Pam 27-100-26, 1 October 1964).

#6 A member of the crew of a visiting warship while acting as coxswain of one of the warship's small boats negligently collides with a small fishing boat and kills two children and an old woman who are territorial State nationals. The visiting State has the primary right to exercise its concurrent jurisdiction over the crime.[153]

#7 A member of the crew of a visiting warship commits an unaggravated assault upon a territorial State launderman when the sailor, who is off duty, learns that the launderman has failed to launder his liberty uniform as promised. The territorial State has the primary right to exercise concurrent jurisdiction over the crime but it is probable that the local jurisdiction would recognize the disciplinary jurisdiction of the ship in this case. An implied waiver of this primary right results where the territorial State fails to request surrender ofthe offender.[154]

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[153] *Ibid.*

[154] *E.g.*, Exemption of United States Forces, [1943] Can. Sup. Ct. at 499-500, 527, [1943] 4 D.L.R. at 23-24, 51, [1943-45] Ann. Dig. at 125, 128, NATO Status of Forces Agreement, art. VII para. 3(b), COLOMBOS § 288, at 250. *Contra*, Institute of International Law, *Regulations Concerning the Status of Ships and Their Crews in Foreign Ports*, art. 16, para. 1 (Aug. 23, 1898), 17 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 277 (1898), RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 147 (Scott ed. 1916), BRITTIN & WATSON § 723.41, at 104, I OPPENHEIM § 450, at 854, SNOW, INTERNATIONAL LAW 24 (2d ed. Stockton 1898), Nagasaki Case, Gregory, *Jurisdiction Over Foreign Ships in Territorial Waters*, 2 MICH. L. REV. 333, 343-44 (1904).

#8 A member of the crew of a visiting warship commits an unaggravated assault with the intent to commit rape upon a territorial State female ship cleaner. The territorial State has the primary right to exercise its concurrent jurisdiction over the crime but it is probable that the local jurisdiction would recognize the disciplinary jurisdiction of the ship. An implied waiver of its primary right results where the territorial State fails to request surrender of the offender.[155]

#9 A member of the crew of a visiting warship rapes a territorial State female ship cleaner. The territorial State has the primary right to exercise its concurrent jurisdiction over the crime but it is probable that the local jurisdiction would recognize the disciplinary jurisdiction of the ship. An implied waiver of its primary right results where the territorial State fails to request surrender of the offender.[156]

#10 A member of the crew of a visiting warship unlawfully kills a territorial State female ship cleaner while he is engaged in the perpetration of a rape. The territorial State has the primary right to exercise its concurrent jurisdiction over the crime. An implied waiver of its primary right results where the territorial State fails to request surrender of the offender.[157]

#11 A territorial State launderman steals either the ship's chronometer or the navigator's personal chronometer. The territorial State has the primary right to exercise its concurrent jurisdiction over the crime.[158]

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[155] *Ibid.*

[156] *Ibid.*

[157] *Ibid.*

[158] *E.g.*, NATO Status of Forces Agreement, art. VII, para. 3(b), Chung Chi Cheung v. The King, [1939]

#12 A territorial State launderman stabs and kills a territorial State female shipcleaner who accidentally witnesses his theft of the ship's chronometer. The territorial State has the primary right to exercise it concurrent jurisdiction over the crime.[159]

A.C. at _____, [1938-40] Ann. Dig. at 269-70 (dictum), Treaty on International Penal Law, Jan 23, 1889, title I, art. 9, para. 3, Martens N.R.G. (2d ser.) at 434, as translated in *Jurisdiction With Respect to Crime*, app. 3, 29 AM. J. INT'L L. SPEC. SUPP. at 638-39 (1935). *Contra*, Institute of International Law, *Regulations Concerning the Legal Status of Ships and Their Crews in Foreign Ports*, art. 16, para. 1 (Aug. 23, 1898), 17 ANNUAIRE DE L'INSTITUTE DE DROIT INTERNATIONAL 277 (1898), RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 147 (Scott ed. 1916), COLOMBOS § 288, at 250, I OPPENHEIM § 450, at 854.

[159] *E.g.*, NATO Status of Forces Agreement, art. VII, para. 3(b), Treaty on International Penal Law, Jan. 23, 1889, title I, art. 9, para. 3, Martens N.R.G. (2d ser.) at 434, as translated in *Jurisdiction With Respect to Crime*, app. 3, 29 AM. J. INT'L L SPEC. SUPP. at 639 (1935), COLOMBOS § 288, at 250, HALL § 55, at 245 n.2. *Contra*, Institute of International Law, *Regulations Concerning the Legal Status of Ships and Their Crews in Foreign Ports*, art. 16, para. 1 (Aug. 23, 1898), 17 ANNUAIRE DE L'INSTITUTE DE DROIT INTERNATIONAL 277 (1898), RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 147 (Scott ed. 1916), I OPPENHEIM § 450, at 854.

CHAPTER IV

RULES OF JURISDICTION OVER CRIMES COMMITTED ASHORE BY A VISITING WARSHIP'S OFFICERS OR CREW

A. EVOLUTION OF THE RULES OF JURISDICTION.

1. European Continent.

a. General rule. Dr. Barton has observed that the fiction of exterritoriality

> demands, as a logical corollary of the premise on which it is based, that each individual member of the visiting force should constitute a kind of 'walking island', bearing all the insignia of his State's sovereignty and thus exclusively subject to the jurisdiction of his own military tribunals.[1]

Ortolan, however, provided no such metaphorical fiction to insulate a visiting warship's officers and crew from the exercise of local jurisdiction while ashore. In his view, when a member of visiting warship's crew stepped ashore from one of the ship's small boats, stepped from one of the ship's ladders into a shore boat, or stepped from the ship's gangplank onto the pier, he left the flag-State's floating enclave behind and crossed an international frontier. While ashore

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[1] Barton, Foreign Armed Forces: Qualified Jurisdictional Immunity, 31 BRIT. YB. INT'L L. 341 350 (1954).

the territorial State has jurisdiction over all of his crimes which were punishable by the local penal law. Thus Phillimore cited Ortolan for the proposition that

> The privilege [exemption from any but the flag-State's jurisdiction] is extended, by the reason of the thing, to boats, tenders, and all appurtenances of a ship of war, but it does not cover offences against the territorial law committed upon *shore*, though the commanders of vessels are entitled to be apprised of the circumstances attending and causes justifying the arrest of any one of their crew, and to secure to them, through the agency of diplomatic or consular ministers, the administration of justice.[2]

Whether or not a visiting warship's officers and crew are exempt from the exercise of local jurisdiction when they come ashore for recreational purposes was raised in the early case of *Affaire Der*.[3] Der was a member of the crew of *The Pearl*, a British warship, which in 1868 visited Saigon, French Indo-China. While ashore on liberty he assaulted a local gendarme and was promptly convicted of assault by the local Tribunal de Police Correctionnel. However, his conviction was

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[2] I PHILLIMORE 479.

[3] Court of Cassation, ________, 1868, [1868] Sirey Recueil General I. 351 (Fr.)(The Pearl). Briefly discussed in Barton, *Foreign Armed Forces: Immunity from Criminal Jurisdiction*, 27 BRIT. YB. INT'L L. 186, 222 (1950).

reversed by the Tribunal Superieur de Saigon on the ground that Der, being a crew member of a visiting warship, was immune from French prosecution. The French Court of Cassation reversed, that court deciding "in favour of the local jurisdiction where there was a breach of ordinary criminal law committed by an English sailor who had gone ashore without being on duty."[4]

b. *Service commande exception.* Not having created any metaphorical fiction to insulate a visiting warship's officers and crew from the territorial State's jurisdiction while ashore and not having adopted the accomodating and workable doctrine of immunities, the advocates of exterritoriality were forced -- in order to protect a visiting warship's officers and crew while ashore in the performance of official duties -- to carve an exception into the territorial State's otherwise intact local jurisdiction. This exception came to be known as the *service commande* exception.

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[4] Manuel v. Ministere Public, Mixed Court of Cassation, March 8, 1943, 55 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 125, ____ (1942-43), [1943-45] Ann. Dig. 154, 158-59 (No. 42). Another English translation appears in 39 AM. J. INT'L L. 349 (1945).

Both the territorial State's jurisdiction over the crimes committed ashore by a visiting warship's officers and crew and the *service commands* exception to that jurisdiction were recognized in "regulations" adopted by the Institute of International Law in 1898 at its meeting at The Hague[5] and later in 1928 at its meeting in Stockholm.[6] Judicially cited as having "summarized international practice and doctrine" on "the immunity from [local] jurisdiction of members of the crew of a warship when ashore,"[7] the Stockholm "regulations" provided:

> If the members of the crew ashore commit breaches of the law of the country they may be arrested by the local authorities and brought before the local courts. The captain of the ship should be notified of the arrest, but has no right to demand their surrender.

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[5] Institute of International Law, *Regulations Concerning the Legal Status of Ships and Their Crews in Foreign Ports* (Aug. 23, 1898), 17 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 278 (1898), RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 143 (Scott ed. 1916).

[6] Institute of International Law, *Reglement sur le Regime des Navires de Mer et de leurs Equipages dans les Ports etrangers en Temps de Paix* (1928), ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 736 (1928).

[7] Ministere Public v. Triandafilou, Mixed Court of Cassation, June 29, 1942, 54 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 259, ____ (1941-42), [1919-42] Ann. Dig. 165, 167-68 (No. 86). Another English translation appears in 39 AM. J. INT'L L. 346 (1945).

> If the offenders regain their ship without having been arrested, the local authorities have no right to board the ship for the purpose of arresting them but can only request that they should be handed over to the tribunals which are competent according to the law of the flag [*i.e.*, flag-State] and that they (the local authorities) should be informed of the result of such proceedings.
>
> If the members of the crew ashore on official duty (*service commande*), whether individually or collectively, commit offences or crimes ashore, the local authority may proceed to arrest them but should hand them over to the captain if he should demand their surrender.
>
> The local authority should after surrendering the delinquents cause a *proces-verbal* to be drawn up stating the facts; and such local authority has the right to request that the delinquents should be prosecuted before the competent authorities and that they should be informed of the result of the proceedings.[8]

2. *Great Britain.*

a. *General rule.* Hall states that "if members of her [a visiting warship's] crew go outside the ship or her tenders or boats they are liable in every respect to the territorial jurisdiction."[9] Apparently this has

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[8] Institute of International Law, *Reglement sur le Regime des Navires de Mer et de leurs Equipages dans les Ports etrangers en Temps de Paix* (1898), art. 20, ANNUAIRE DE L'INSTITUTE DE DROIT INTERNATIONAL 743 (1928), as translated in [1919-42] Ann. Dig. at 167-68.

[9] HALL § 55, at 249.

when such rights were being sought by Great Britain. In 1858, for example, Great Britain obtained by the Treaty of Tientsin a renunciation by China of jurisdiction over all British subjects who committed crimes in China, a renunciation still in effect in 1937 when Chung Chi Cheung, the cabin boy, murdered his commanding officer.

What if a member of a visiting warship's crew commits a crime while ashore but returns to his ship without being arrested by the local authorities? Does the territorial States still retain its primary right to exercise its concurrent jurisdiction over his crime?

The pre-World War II British view on this question reflects Cockburn's following comment in this area:

> The rule which reason and good sense would, as it strikes me, prescribe, would be that . . . . if, a crime having been committed on shore, the criminal gets on board a foreign ship, he should be given up to the local authorities.[13]

Thus Lawrence stated:

> Should they [the members of the ship's company] thus misconduct themselves and then succeed in escaping to their ship, the commanding officer ought, if the matter is at all serious, to punish them on the application of the local authorities or deliver them to the latter for punishment, the first course being in general preferable.[14]

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[13] *Supra* note 73, chapter III.

[14] LAWRENCE § 108, at 232.

The post-World War II British view on this question reflects the decisions of the Mixed Courts of Egypt in this area. Thus Brierly, citing *Orfanidis v. Ministere Public*,[15] states that

> if they [the members of the crew] regain their ship without having been arrested, the local authorities cannot insist upon their surrender, only that they should be dealt with under the law of the sending state.[16]

b. *Service commande exception*. Neither Phillimore,[17] Hall,[18] nor Westlake,[19] for example, provide any support for the *service commande* exception. The exception does appear, however, in the works of later writers. Lawrence, for example, states that "the immunities of which we have been speaking do not follow the members of the ship's company when they land for their own purposes and *not on public business*."[20] Higgins, in his last edition of Hall's *International Law*, citing Perels and Bonfils, states that if a member of the crew of a visiting warship comes ashore

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[15] Mixed Court of Cassation, May 31, 1943, 55 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 169 (1942-43), [1943-45] Ann. Dig. 141 (No. 38).

[16] BRIERLY 269. [17] I PHILLIMORE 479.

[18] HALL § 55, at 249.

[19] I WESTLAKE, INTERNATIONAL LAW 267 (2d ed. 1910) [hereafter cited as WESTLAKE].

[20] LAWRENCE § 108, at 231. (Emphasis added.)

> for an object connected with naval duty, the member of the crew should be immune /from local jurisdiction/; if for some other object, such as recreation, he should not be . . . .[21]

Oppenheim states:

> The position of the commander and the crew of a man-of-war in a foreign port when they are on land is controversial. The majority of writers distinguish between a stay on land in the service of the man-of-war and a stay for other purposes. The commander and members of the crew ashore in an official capacity in the service of their vessel, to buy provisions or to make other arrangements respecting the vessel, remain under the exclusive jurisdiction of their home State, even in respect of crimes committed ashore. Although they may, if necessary, be arrested to prevent further violence, they must at once be surrendered to the vessel. On the other hand, if they are on land not on official business but for purposes of pleasure and recreation, they are under the territorial supremacy of the littoral State like any other foreigners, and they may be punished for crimes committed ashore.[22]

And Waldock, in his most recent edition of Brierly's Law of Nations, states:

> If they /members of a visiting warship's crew/ go ashore on official business, there is authority for the view that they are in principle exempt from the local jurisdiction; and that, while they may be put under restraint should they commit offences ashore, they must be handed over to be dealt with under the laws of the sending state, if the commanding officer so requests. On the other hand, if they go

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[21] HALL § 55, at 249 n.1.

[22] I OPPENHEIM § 451, at 855. (Emphasis added.)

> ashore merely on leave, they are not exempt and may be arrested and tried before the local courts for breaches of the local law . . . .[23]

Colombos sums up the rules of jurisdiction generally applicable to a visiting warship's officers and crew while ashore as follows:

> The practice generally followed is to apply the principle of exterritoriality to them when they are on land in uniform and in an official capacity connected with the service of their ship. But if they are ashore not in uniform or on an official business, they are subject to the territorial jurisdiction of the littoral State, which is entitled to prosecute them for any crimes against the local laws.[24]

3. Egypt.

a. The Mixed Courts. Dr. Barton observes that

> The most fecund source of jurisprudence on the question of the exercise of criminal jurisdiction by local courts over members of a visiting force was the Mixed Courts of Egypt.[25]

These courts were created by Great Britain just before World War II to exercise part of Britain's extra-territorial jurisdiction in Egypt and functioned throughout

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[23] BRIERLY 269. [24] COLOMBOS § 289, at 251.

[25] Barton, Foreign Armed Forces: Immunity From Criminal Jurisdiction, 27 BRIT. YB. INT'L L. 186, 255 (1950). See generally, Brinton, Jurisdiction Over Members of Allied Forces in Egypt, 38 AM. J. INT'L L. 375 (1944). and Brinton, The Egyptian Mixed Courts and Foreign Armed Forces, 40 AM. J. INT'L L. 737 (1946).

the war, hearing criminal cases involving members of many of the Allied military forces which were present in Egypt during that period. The Mixed Courts of Egypt were comprised of the Misdemeanor Court, the Court of Assizes under the presidency of a British judge, and the Court of Cassation -- sometimes referred to as the Court of Appeals -- whose bench included both an American member and an English member. While these courts followed French procedure, their decisions -- particularly those of the Court of Cassation -- were more characteristic of the decisions of common law appellate courts. Originally reported in the _bulletin de legislation et de jurisprudence egyptiennes_, many of these decisions have been translated for English language international law journals[26] and digests[27] and have been frequently cited in postwar articles[28] and editions of standard treaties[29] on international law.

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[26] _E.g._, Manuel v. Ministere Public, Mixed Court of Cassation, March 8, 1943, 55 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 125 (1942-43), translated in 39 AM. J. INT'L L. 349 (1945).

[27] _E.g._, Gounaris v. Ministere Public, Mixed Court of Cassation, May 10, 1943, 55 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 156 (1942-43), translated in [1943-45] Ann. Dig. 152 (No. 41).

[28] _E.g._, Barton, _Foreign Armed Forces: Qualified Jurisdictional Immunity_, 31 BRIT. YB. INT'L L. 341, 351-58 (1954).

[29] _E.g._, BRIERLY 269 nn. 1, 3, I OPPENHEIM § 451, at 855 n.2.

b. General rule. Gaitanos v. Ministere Public,[30] an early decision by the Mixed Court of Cassation, presented the most frequently encountered-type factual situation in criminal cases involving visiting naval forces ashore: a crew member of a visiting warship while ashore on "liberty" (i.e., recreation) commits a crime punishable by local law, is arrested flagrante delicto, held, and charged by the local police, and is then tried, convicted, and sentenced for his crime by the local criminal court. Here Gaitanos was convicted by the Correctional Tribunal of Mansourah and sentenced to a year's confinement at hard labor for having imported into Egypt a quantity of hachiche for purposes of sale. On appeal he argued that the local criminal court had no jurisdiction since, as a crew member of a visiting Greek warship, his crime was justiciable only by the Greek military courts. The Mixed Court of Cassation dismissed his appeal, holding:

> This was a case where an ordinary crime had been committed by a sailor ashore and it was

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[30] Mixed Court of Cassation, June 29, 1942, 54 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 257 (1941-42), [1919-42] Ann. Dig. 169 (No. 87).

> not contended that the offence was committed whilst the appellant was engaged on a mission under orders.[31]

In Anne v. Ministere Public five sailors from The Duquesne and The Lorraine, French warships anchored in the port of Alexandria, went ashore and jointly committed the crime of robbery. Only Anne was arrested flagrante delicto, the other four regaining their respective ships. Anne, tried and convicted before the local court of first instance, appealed his conviction, contending

> (1) that international law considered a warship as part of the national territory of the flag State when anchored in the territory waters of a foreign country, and that the members of the crew were covered by this immunity ashore [i.e., the "walking island" fiction], irrespective of the question whether or not they were engaged on a special mission ("service commande") at the time;
>
> (2) that, although in the case of a person arrested flagrante delicto the territorial authorities have the right to arrest the offender, a usage has grown up equivalent to a rule of law that the offender should be handed over to the authorities of the flag State, subject only to the condition that the latter must keep the territorial authority informed of any punishment imposed.[32]

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[31] Id. at ______, [1919-42] at 170.

[32] 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES at 52, [1943-45] Ann. Dig. at 115-16.

The Mixed Court of Cassation dismissed the appeal, ruling

> Without doubt, the jurisdiction of the territorial power arising in accordance with its own laws is subject to the recognized rights of the foreign military authorities in question, but only in accordance with the limits imposed by international law regarding the exercise of that jurisdiction. These limits are moreover laid down, as far as members of the crew of a warship anchored in port are concerned, by the Resolutions voted at Stockholm in 1928 and more particularly by Article 20. It has already been decided by this Court that these Resolutions should be regarded as applicable in time of war just as much as in time of peace, although in fact the Institute of International Law confined itself to stating the rules which prevail in peace-time.
>
> Article 20, in its first paragraph, merely confirms the jurisdiction of the territorial power in accordance with the principles generally recognized in criminal matters . . . and requires only that notice of the arrest should be given to the commander of the ship, who cannot require members of the crew to be handed over.[33]

What if either Gaitenos or Anne had been able to regain his warship without having been arrested by the local authorities? Such was the case in Orfanidis v. Ministere Public and, as mentioned previously, was the case with Anne's four accomplices, two of whom were jointly tried with him in Anne v. Ministere Public. In

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[33] Id. at 54, [1943-45] Ann. Dig. at 118.

both of these cases the Mixed Court of Cassation expressly approved the following rule contained in 1928 Stockholm "regulations" voted by the Institute of International Law:

> If the offenders regain their ship without having been arrested, the local authorities have no right to board the ship for the purpose of arresting them but can only request that they should be handed over to the tribunals which are competent according to the law of the flag and that they (the local authorities) should be informed of the result of such proceedings.

While under the Stockholm "regulations" the local authorities "have no right to board the ship for the purpose of arresting" crew members who have committed crimes ashore but who have regained "their ship without having been arrested," yet the local authorities are often <u>not</u> satisfied merely to request that the offenders "be handed over to the tribunals which are competent according to the law of the flag and that they . . . should be informed of the result of such proceedings."

In <u>Orfanidis v. Ministere Public</u> the prosecuting chief of the Parquet mixte at Port Fouad requested the Greek Navy to surrender Orfanidis for investigative purposes. Vice Admiral Godefroy, commander of the Greek Navy squadron to which Orfanidis' ship was attached, complied with the request but thoughtfully covered himself with the following letter:

> In compliance with your request I hand over to you, for the purposes of investigation only, the sailor John Orphanidis [sic], with the express reservation that you surrender him to me after the investigation has been completed so that he may be tried by the Greek authorities to whose jurisdiction he is subject.[14]

However, upon completion of the Egyptian investigation the offender was not surrendered back to the Greek Navy but was tried, convicted, and sentenced by the Correctional Tribunal of Mansourah. He appealed, maintaining that the trial court should have declined jurisdiction to try his case on the merits. The Mixed Court of Cassation agreed, ruling:

> [I]f the sailor regained his warship, whatever the reason might be, without having been arrested by the local authority, he was already protected by the immunity from jurisdiction recognized as belonging to the warship. The surrender of the offender for the sole purpose of investigation did not imply renunciation of the benefit of this immunity.[15]

In Enna v. Ministere Public a similar request was made to the Greek Navy to surrender two of the four culprits who had regained their warship. Again, Admiral

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[14] 55 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES at _____, [1943-45] Ann. Dig. at 142.

[15] Id. at _____, [1943-45] at 142.

Godefroy complied with the request but again did so subject to the express reservation -- this time sent directly to the juge d'instruction or examining magistrate -- that these two sailors be immediately afterwards brought back on board ship, adding for emphasis:

> In order to avoid any possible misunderstanding, you will allow me to state that the course I have taken with a view to assisting the Egyptian authorities concerned with the administration of justice at Alexandria should not be considered as signifying that I wash my hands of this affair. This matter should normally be judged by the naval tribunal of my squadron, seeing that one only of the accused was actually arrested on Egyptian soil by the Egyptian police.[36]

While neither of Admiral Godefroy's letters left any room for doubt, his stronger second letter covering two of Anne's four accomplices plus the decision of the Mixed Court of Cassation in Orfanidis v. Ministere Public were apparently adequate to dissuade the local authorities from attempting to prosecute these two.

As to the remaining two accomplices, the local authorities took another tack. Armed with a warrant (un mandat d'amener) summoning these two culprits to appear before the juge d'instruction, the local police

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[36] 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES at 53, [1943-45] Ann. Dig. at 116.

went aboard ship in order to execute the warrant. After the matter was referred to Admiral Godefroy, the two were surrendered to the police, unfortunately *without* the benefit of one of the Admiral's covering letters. When the culprits appeared before the *juge d'instruction*, he issued a warrant for their arrest (*un mandat d'arret*) pursuant to which they were placed in preventative detention. When they unwisely evaded that detention the Egyptian authorities had their charge: evading preventive detention. They appealed their conviction -- having been tried in common with Anne -- arguing that their preventive detention was illegal. The Mixed Court of Cassation, however, dismissed their appeal. Commented Lauterpacht in his translation-digest of the case:

> The reasoning of the Court was not clear at this point but the intention seems to have been to point out that the surrender of the appellants in the present case was unconditional, and that, accordingly, whatever form the warrant took, there was an implied waiver in regard to the two sailors actually surrendered, whereas in the case of the two sailors dealt with by the letter of April 20, 1943, there was an express reservation of ultimate jurisdiction, the surrender being only for the purposes of enquiry; and accordingly, preventive detention alone would be justifiable in such a case.[37]

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[37] [1943-45] Ann. Dig. at 117.

It appears quite clear, however, that Admiral Godefroy in fact had no intention of unconditionally surrendering Anne's two accomplices. His failure to draft a third cover letter was no doubt prompted by the fact that he had just written the same *juge d'instruction* concerning two other culprits to the same crime and by the fact that the police appeared to be on board not to serve warrants for arrest on prospective defendants but to serve a summons on prospective witnesses. His permitting the Egyptian police to serve their criminal process on board was nothing more or less than a good faith compliance with his previously announced policy of "assisting the Egyptian authorities concerned with the administration of justice at Alexandria . . . ."

On the other hand, in *Ministere Public v. Korakis* it is also quite clear that the Egyptian authorities had no intention of unconditionally surrendering Korakis *et al.* to the Greek military police. Korakis and three other crew members of *The Averoff*, a Greek warship visiting at Port Said, were ashore on liberty. During a cafe brawl they committed an aggravated assault upon one Zoumberos but were arrested by the Egyptian police before they could flee the cafe. However, since the Egyptian police could speak no Greek and since the

culprits allegedly could speak neither French, English, nor Arabic, the police surrendered them to the Greek military police without apparent conditions. When the Greek sailors were later brought to trial before the local Egyptian court of first instance, they contended that the court had no jurisdiction on the grounds that they "had regained their ship before any intervention took place by the Egyptian authorities and that they had already been dealt with by court-martial." The trial judge sustained their objection, whereupon the Ministere Public appealed, contending

> that it was impossible to interrogate them . . . . that the surrender was only effected after their names had been taken and a numbered receipt signed by the military police to whom they were handed over had been obtained . . . .[and] that the surrender of the offenders to the military authorities of their own country was not made with the intention of renouncing Egyptian sovereignty but merely as a matter of courtesy and in order to spare the accused, who had not yet been interrogated, the inconvenience of spending the night in prison.[38]

The Mixed Court of Cassation dismissed the appeal, ruling:

> [W]here the local authority, having arrested the offenders, surrenders them to the commander

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[38] 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES at 67, [1943-45] Ann. Dig. at 121.

> of their ship without reservation, the courts of the flag State recover the exercise of their jurisdiction.
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> . . . .Even supposing that the local police, who had not yet ascertained the gravity of the offence but merely knew that a brawl had taken place in which these sailors were concerned, had not the intention when surrendering them to the Greek authorities of renouncing the exercise of jurisdiction, nevertheless the appeal should be dismissed in the present case, unless there is sufficient proof that the offenders who actually regained their ship were only allowed to do so subject to the condition that the eventual exercise of jurisdiction was reserved. A purely mental reservation is not the equivalent even to a tacit condition, and it is hardly necessary to point out that it is not a question of an express or tacit renunciation of local sovereignty, but simply a question of a conflict of jurisdiction.
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> In these circumstances the accused, having regained their ship, and no notice of their arrest having been given to the commander of that ship, the Greek authorities could properly claim the exercise of jurisdiction by their courts in conformity with the terms of Article 20 [of the 1928 Stockholm "resolutions"] quoted above.[39]

c. Service commande exception. The Mixed Courts of Egypt having adopted the first two rules of jurisdiction contained in the 1928 Stockholm "resolutions" regarding the crimes of a visiting warship's crew while ashore, it was not surprising that the third and last Stockholm rule -- the service commande exception -- was also adopted.

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[39] Id. at 68, [1943-45] Ann. Dig. at 122-23. (Emphasis added.)

The leading case -- Ministere Public v. Triandafilou[30]-- provides not only a very interesting example but also a very liberal application of the service commande exception. Triandafilou was a crew member of The Panther, a Greek warship lying in the port of Alexandria. Shortly before midnight, while ashore in Alexandria, he emerged in a drunken condition from a bar in the Place Mohamed Aly, came upon an Egyptian policeman endeavoring to escort certain "actresses" and a taxi-driver to the police station, drew a concealed dagger, and stabbed the policeman in the right buttock. Arrested and later brought to trial before the Tribunal of Alexandria, Triandafilou produced a certificate from his captain stating that he had left the ship charged with a mission ashore -- the purchase of ship's provisions -- with leave to report back on board by midnight. Triandafilou, therefore, argued that the court had no jurisdiction over his crimes under international law. The court disagreed

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[30] Mixed Court of Cassation, June 29, 1942, 54 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 259 (1941-42), [1919-42] Ann. Dig. 165 (No. 86). Another English translation appears in 39 AM. J. INT'L L. 346 (1945).

and convicted him of both charges: assaulting a policeman and carrying a concealed weapon. On appeal, the Correctional Tribunal of Alexandria acquitted him on the weapon charge "because the possession of the weapon by the accused could be justified by the necessities of his official duties" and because "it is established that he left his ship on these duties and that he was carrying the dagger when he left the ship."[31] This court, however, upheld the assault charge, reasoning:

> The fact that he left the ship on a mission does not affect the first charge because it is clear that the stabbing was done by the accused at a time when he was not engaged on official duties.[32]

On appeal, the Mixed Court of Cassation quashed Triandafilou's assault conviction by the following interpretation of the *service commande* exception:

> *The only reason why the members of the crew of a warship enjoy any immunity ashore is that they are carrying out orders relative to the needs of the ship.* In effect it is a case of extending the immunity of the ship itself outside the ship for the purpose of meeting its

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[31] Correctional Tribunal of Alexandria, May 4, 1942, 54 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 189, _____ (1941-42), [1919-42] Ann. Dig. 165, 167 (No. 86).

[32] *Id.* at _____, [1919-42] Ann. Dig. at 167.

> needs. This is the basis of the principle which withdraws these members of the crew from the local jurisdiction when they are on a mission (*service commande*). Furthermore, these last words should be interpreted not with regard to the actions of him who has received the order but with regards to him who gave the order and who is concerned with its execution. In the present case the sailor *Triandafilou had not yet returned to his ship to give an account of his mission*, *and he was therefore still engaged on the mission when he committed the offense charged*.[33]

Judge Brinton, the American member of the Mixed Court of Cassation, has provided this further insight into the court's reasoning in the *Triandafilou* case:

> As to whether the seaman was at the time of the offense engaged in a *service commande* the court . . . held that the question depended not on the intrinsic character of the offender's act or on his own state of mind but on the nature of the orders under which he was serving, a test which placed him within the scope of the exception.[34]

A few months later, in *Ministere Public v. Tsoukharis*,[35] the Mixed Court of Cassation again had

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[33] 54 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES at ____, [1919-42] Ann. Dig. at 169. (Emphasis added.)

[34] Brinton, *Jurisdiction Over Members of Allied Forces in Egypt*, 38 AM. J. INT'L L. 375, 379 (1944).

[35] Mixed Court of Cassation, Feb. 8, 1943, 55 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 89 (1942-43), [1943-45] Ann. Dig. 150 (No. 40).

before it a *service commande* exception-type case. While the court was unable to make a definitive ruling, not having adequate evidence in the record as to Tsoukharis' alleged official mission ashore, the court did make this clarifying statement regarding the *Triandafilou* test:

> Applying this [the *Triandafilou*] principle it seems clear that the person giving the order is interested in the report of the person sent, whereas the latter is interested in prolonging the duration of the mission. If therefore there is no report to make there is no order in question, and a soldier who abuses his mission to prolong his leave will cease to be covered by immunity from jurisdiction.[36]

In Lauterpacht's digest of *Ministere Public v. Triandafilou*, he added the following critical "note":

> The judgment of the Court of Cassation adopts an interesting test of whether the accused is still on a mission, namely, whether he has reported to his superiors. It seems clear that Triandafilou was in fact engaged on a "private frolic of his own" (to use a familiar common law expression), but this made no difference. Presumably the decision would have been the same if the act had taken place after midnight, *i.e.*, after the time for returning to his ship had expired. It is, however, likely that the application of this test is subject to some limitation in point of time, *i.e.* the period within which a member of the crew might be reasonably expected to return and make

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[36] *Id.* at ______, [1943-45] Ann. Dig. at 152.

> his report. That must, of course, be a question of fact to be decided in the circumstances of each case.[37]

However, the real criticism here should not be directed to the court's application of the _service commande_ exception but to the manner in which the Institute of International Law framed that exception which reads:

> If the members of the crew ashore on official duty (_service commande_), whether individually or collectively, commit offences or crimes ashore, the local authority may proceed to arrest them but should hand them over to the captain if he should demand their surrender.

Restated the exception provides:

> _While_ a member of the crew of a visiting warship is ashore on official duty he is immune from the exercise of local jurisdiction over any crimes he might commit.

By putting the exception in a _time framework_, the Institute encouraged the conclusion that, since the crew member cannot _rightfully_ deviate from or abandon his performance of an official duty, he must therefore while ashore be immune from the exercise of local jurisdiction until he completes his performance of that official duty.[38] The fallicy in this conclusion, of

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[37] [1919-42] Ann. Dig. at 169.

[38] _E.g._, In _Ministere Public v. Tsoukharis_ the Mixed Court of Cassation summarized its _Triandafilou_ ruling to be that "the local courts had no jurisdiction

course, is that the crew member -- legally speaking -- <u>can</u> wrongfully deviate from or abandon the performance of his official duty, at which time he becomes subject both to the criminal sanctions of his flag-State for his wrongful failure to perform his official duty[39] and to the jurisdiction of the territorial State for any local crimes he might thereafter commit while ashore. In the words of the Mixed Court of Cassation:

> The only reason why the members of the crew of a warship enjoy any immunity ashore is that they are carrying out orders relative to the needs of the ship.

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in respect of breaches of ordinary criminal law committed by a sailor ashore <u>during</u> his stay there on duty." 55 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES at _____, /1943-45/ Ann. Dig. at 152. (Emphasis added.) In <u>Guebali v. Mei</u> the Civil Tribunal of Cairo, citing <u>Triandafilou</u> and <u>Tsoukharis</u>, used the phrase "<u>while</u> the offender is on duty." April 22, 1943, 55 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE 120, _____ (1942-43), /1943-45/ Ann. Dig. 164 (No. 44) (dictum). (Emphasis added.)

[39] <u>E.g.</u>, UCMJ, art. 92, provides in part, "Any person subject to this chapter who --- . . . (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the same; or (3) is derelect in the performance of his duties; shall be punished as a court-martial may direct."

Fortunately, the _service commands_ exception as framed in the NATO Status of Forces Agreement helps to avoid -- rather than to encourage -- a _Triandafilou_-type conclusion by clearly requiring

> something more than that the offense was committed during the period while the accused was _on_ official duty. This additional ingredient is a causal connection between the offense committed and an act or ommission /sic/ done in the performance of official duty.[40]

4. _United States of America_.

a. _General rule_. Dating from correspondence of the Secretary of State in 1794,[41] the United States has consistently recognized that a visiting warship's officers and crew while ashore are amenable to the territorial State's jurisdiction. In 1894, Dr. Snow of Harvard, in his lectures on international law to the United States Naval War College,[42] stated this general rule of jurisdiction as follows:

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[40] Ellert, _The United States as a Receiving State_, 63 DICK. L. REV. 75, 89 (1959).

[41] II HYDE §§ 255, at 830 n.2.

[42] Shortly after Dr. Snow's sudden death, these lectures were prepared and arranged for publication by the Navy Department and printed by the federal government.

[illegible]

> [illegible]

9. [illegible]

a. [illegible]

[illegible]

[illegible]

[illegible]

> The rules [of immunity from local jurisdiction] as to ships apply to all tenders, boats, or other flotilla belonging to vessels of war and detached therefrom upon any service, but *when the officers or men to a vessel of war are in shore boats or reach land*, *they are under the local jurisdiction*.[43]

In 1917, in *United States v. Thierichens*,[44] the defense counsel sought to get their client out from "under the local jurisdiction" but failed, in part no doubt because of the unfortunate historical context in which the case was set. The accused, commander of *The Prinz Eitel Friedrich*, an interned German Navy cruiser, was indicted for smuggling certain of his warship's chronometers into Philadelphia. His counsel argued in support of a preliminary motion to quash the indictment

> (1) That the commander of the vessel under such circumstances is the representative of the sovereign of his country;[45] and
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> (2) that the privilege of extra-territoriality applies to offenses committed in connection with a public vessel of a friendly nation

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[43] SNOW, INTERNATIONAL LAW § 16, at 23 (2d ed. Stockton 1898) (Emphasis added); *cf.*, WILSON, INTERNATIONAL LAW § 50, at 149 (1910).

[44] 243 Fed. 419 (E.D. Penn. 1917).

[45] "Even the captain is not considered to be individually exempt in respect of acts [ashore] not done in his capacity of *agent of his state*." HALL 249. (Emphasis added.)

> to [*sic*, qy. by] those officially connected therewith, and therefore such officials committing such offenses may be tried and punished only by the sovereign power of his ship represents, upon the theory that the ship is part of the territory of that sovereign.[46]

Without passing on "the question of immunity of the defendant as the representative of the German sovereign," the court said that "nothing appears upon the record to justify that inference . . . ."[47] However, as to the proposition that the captain was clothed in the warship's "extra-territoriality" the court said:

> Passing to the question of extraterritoriality, indictment No. 67 sufficiently alleges the commission of the offense without the territory of the United States, and, as pointed out by the district attorney, the offense of smuggling is itself inconsistent with the theory of its commission upon the Prinz Eitel Friedrich, as that offense is not complete until the goods . . . charged to be smuggled are brought off the vessel into port.[48]

While the defense probably meant to argue "that the privilege of extraterritoriality applies to offenses committed [both afloat and ashore] in connection with a

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[46] 243 Fed. at 420. [47] *Id.* at 421.

[48] *Ibid.*

public vessel of a friendly nation to [*sic*, qy. by] those officially connected therewith," the court definitely limited the privilege to crimes consummated on board the visiting warship.[49]

In 1958, in *The Case of the Goodwill Visit Sailors*,[50] the culprits were able to get themselves out from "under the local jurisdiction" by leaving that jurisdiction unapprehended. Here several crew members of a visiting aircraft carrier, while ashore in Oslo, Norway, during the goodwill visit of a United States Navy task force, assaulted and severely injured a Norweigan national who, because of his injuries, was unable to identify them before the task force put to sea. "Had the culprits been apprehended by the Norweigan authorities, there would have been no question to their right to exercise [Norway's *concurrent*] jurisdiction to try the men."[51] The United States, however, also had

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[49] "Possessing his ship, in which he [the captain] is not only protected, but in which he has entire freedom of movement, he lies under no necessity of exposing himself to the exercise of the [littoral] country, and if he does so voluntarily he may fairly be expected to take the consequences of his act." HALL 249.

[50] Neese, *U.S. Navy Ships in Foreign Ports*, JAG J. 7 (March-April 1960).

[51] *Id.* at 25.

concurrent jurisdiction "since the men involved were naval personnel."[52] In December 1958, when the Navy solved the case, the victim was flown to the United States and identified his assailants who were thereafter convicted by a Navy general court-martial for aggravated assault.[53]

In 1960, however, Brittin and Watson stated concerning the officers and men of a visiting warship who go ashore *unofficially* for liberty or leave:

> The status of such person has often been a source of disagreement among nations. Because of the effect that the absence of any member of the crew would have on the fighting effectiveness of a warship, *many nations have contended that the exercise of criminal jurisdiction over the warship's personnel by the local authorities would be an interference with the sovereignty of the visiting warship's nation.* On the other hand, it can be argued with equal force that a visiting ship, by voluntarily granting liberty to members of her crew, has consented to the exercise of criminal jurisdiction over them by the territorial sovereign, who . . . ordinarily has full governmental authority over all persons and things within the boundaries of its territory. This jurisdiction would obviously include crew members of a visiting warship. Because of these powerful but conflicting arguments, *the law as to the*

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[52] *Ibid.*

[53] *Ibid.* "The victim has filed a claim for his damages with the U.S. Country Representative in Norway (U.S. Air Force), which in due course will be paid." *Ibid.*

> *status of the personnel of visiting warships while ashore unofficially is not settled*. However, the tendency today is for the foreign power to take jurisdiction, thus we must be prepared for that contingency when visiting a foreign port.[54]

Brittin and Watson cite no references for their observation that "many nations have contended that the exercise of criminal jurisdiction over the warship's personnel by the local authorities would be an interference with the sovereignty of the visiting warship's nation" and none has been uncovered during this study. It appears rather that the law as to the status of the personnel of visiting warships while ashore unofficially is substantially settled, both in the United States and elsewhere.

b. *Service commande exception*. The United States has never recognized the *service commande* exception, either as stated originally in The Hague "resolutions" of 1898 or as later stated in the Stockholm "resolutions" of 1928. Hyde, for example, says nothing in either 1922[55] or 1945 to indicate any American support for such an exception, stating merely:

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[54] BRITTIN & WATSON § 723.42, at 105. (Emphasis added.)

[55] I HYDE, INTERNATIONAL LAW § 255, at 441 (1st ed. 1922).

> The exemption enjoyed by persons officially connected with and on board of a foreign public vessel does not accompany them after they have left the ship or its tenders and are on shore. . . . . Officers and crews of foreign vessels of war, who commit offenses while ashore, are generally subject to local jurisdiction.[56]

The most that Hyde very conservatively suggests is that a visiting warship's *commander* while ashore should be exempt from local *process*.

> Possibly the commander of a vessel of war who goes ashore in order to accomplish an end directly connected with or incidental to the public business which brought his vessel into the port, ought not, while so engaged, to be amenable to local process, *provided he does not, in the course of his errand, violate the local law*. . . . It is not known, however, that such an exemption within the limits stated has been claimed or granted by the United States.[57]

In 1960 Brittin and Watson stated:

> When the officers or crew of the warship go ashore on official business, it is customary that the local authorities waive all jurisdiction over them. For their acts on shore these officers and men are answerable only to their naval superiors. It is just as if they were on board ship.[58]

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[56] II HYDE § 255, at 830.

[57] *Id.* at 831. (Emphasis added.)

[58] BRITTIN & WATSON § 723.42, at 104-05.

However, their use of the term "official business" indicates a reliance upon the *service commands* exception as discussed by Brierly,[59] Colombos,[60] and Oppenheim[61] rather than upon any American source or evidence.

It thus appears that when the United States in 1951 acquired, as a NATO sending State, the primary right to exercise its concurrent jurisdiction over those crimes committed ashore by its visiting naval forces which fall within the NATO Status of Forces Agreement "official duty" exception (albeit an exception more limited than the Stockholm *service commands* exception), it was legally accurate to say that "under that agreement the sending state acquires more jurisdiction over its forces than it would have without an agreement,"[62] at least as the United States then interpreted the rules of jurisdiction under international law.

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[59] BRIERLY 269.   [60] COLOMBOS § 289, at 251.

[61] I OPPENHEIM § 451, at 855.

[62] "International Law and the Status of Forces Agreement," U.S. DEPT. OF JUSTICE MEMO, *Hearings on Status of Forces Agreements Before the House Committee on Foreign Affairs*, 84th Cong., 1st Sess. 139, 155 (1955).

The United States now appears to be well on the way to recognizing the NATO Status of Forces Agreement "official duty" exception as a rule of international law applicable in its relations with States who are <u>not</u> signatories to the agreement. Evidence of this development is found, for example, in The American Law Institute's 1962 proposed restatement on <u>The Foreign Relations Law of the United States.</u>[63]

The Institute's proposed restatement sets forth no separate rule of jurisdiction applicable to a visiting warship's officers and crew while ashore on official duty. However, the "Reporter's Notes" to the section on "Visit in Port of Foreign Naval Vessels or Other Vessels in the Military Service"[64] state:

> Treaties seldom govern the exercise of jurisdiction over visiting naval vessels and their personnel. When an armed patrol is sent ashore, with the express or implied consent of the territorial sovereign, to police the conduct of personnel from the vessel on shore liberty, the jurisdictional situation of the patrol is so similar to that of a friendly force visiting the territory of another state (other than a force

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[63] RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES (Prop. Off. Draft, 1962) /hereafter referred to as RESTATEMENT/.

[64] *Id.* § 52, at 176. "The rule stated in this Section has no application to the personnel of a vessel while they are ashore." *Id.* § 52, comment *d* at 177.

> in passage) that the rules governing visiting forces presumably apply to the patrol. See §§ 54-65.[65]

One of the rules governing visiting armed forces provides

> that the sending state shall have the prior right to exercise enforcement jurisdiction within the territory over members of the forces with respect to (a) an offense committed by a member of the force in the performance of duty . . . .[66]

The Institute's "duty" exception appears to be legally the equivalent of the NATO Status of Forces Agreement "official duty" exception which provides that

> The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force . . . in relation to . . . (ii) offences arising out of any act or omissions done in the performance of official duty.[67]

Supporting this conclusion are the Institute's comments on it's "duty" exception which point to a NATO Status of Forces Agreement-type requirement of a causal connection between the offense committed and an act or

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[65] *Id.* § 52, *Reporter's Notes* 1 at 178. (Emphasis added.)

[66] *Id.* § 62, at 194.

[67] Art. VII, para. 3(a).

omission done in the performance of official duty. Two such comments, for example, are:

> Military authorities of the sending state have a right to exercise primary jurisdiction over offences *committed* by members of a force *in the course of duty*.[68]

> Acceptance of the certification of the commanding officer that an accused was *acting in the performance of duty when the act in question was committed* is one method of resolving this problem.[69]

A rule which would also exempt a visiting warship's crew from local jurisdiction while ashore *unofficially* for liberty or leave has been proposed by Colonel King who reasoned:

> The need for the captain of a warship in a theatre of operations in time of war to have complete and exclusive jurisdiction and control over his men, even if they go ashore temporarily, is as great as that of a commanding officer of land troops. Every man on a warship has his battle station. Surplus personnel are rarely carried. For the courts or police of another even though friendly nation to take a man from his ship diminishes *pro tanto* her combat efficiency, and she may have to engage in combat an hour after leaving harbor. There is therefore

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[68] RESTATEMENT § 62, comment *b* at 194. (Emphasis added.)

[69] *Id.* § 62, comment *c* at 195. (Emphasis added.)

> the strongest military reason against permitting the local jurisdiction to prevail in time of war and in favor of the man's being tried only by the courts-martial of his own navy.[70]

This is, of course, neither the rule in time of war nor a fortiori in time of peace.

B. RULES OF JURISDICTION.

1. Jurisdiction Over Crimes Committed Ashore by a Visiting Warship's Officers or Crew.

a. Exclusive jurisdiction.

(1) Visiting State. Under international law a visiting State has *exclusive* jurisdiction over all crimes, punishable by its law but not by the territorial State's law, which are committed ashore by a visiting warship's officers or crew.[71]

(2) Territorial State. Under international law a territorial State has *exclusive* jurisdiction over all crimes, punishable by its law but not by the visiting

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[70] King, *Further Developments Concerning Jurisdiction Over Friendly Foreign Armed Forces*, 40 AM J. INT'L L. 257, 260 (1946).

[71] NATO Status of Forces Agreement, art. VII, para. 2(a); *cf*. Kinsella v. Krueger, 351 U.S. 470, 473 (1956), United States v. Sinigar, 6 USCMA 330, 336, 20 CMR 46, 52 (1955).

State's law, which are committed ashore within its territory by a visiting warship's officers or crew.[72]

b. Concurrent jurisdiction. Under international law visiting and territorial States have concurrent jurisdiction over all crimes, punishable by the laws of both States, which are committed ashore within the territorial State by a visiting warship's officers or crew.[73]

2. Right to Exercise Jurisdiction Over Crimes Committed Ashore By a Visiting Warship's Officers or Crew.

a. Crimes over which the visiting State has exclusive jurisdiction. Under international law a State has the right to exercise within its own home territory

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[72] NATO Status of Forces Agreement, art. VII, para. 2(b); *cf.* Kinsella v. Krueger, 351 U.S. 470, 479 (1956), United States v. Sinigar, 6 USCMA 330, 336, 20 CMR 46 52 (1955).

[73] NATO Status of Forces Agreement, art. VII, para. 1, Exemption of United States Forces, [1943] Can. Sup. Ct. 483, [1943] 4 D.L.R. 11 (1943), [1943-45] Ann. Dig. 124 (No. 36), Ministere Public v. Korakis, Mixed Court of Cassation, Dec. 11, 1944, 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 66, 67, [1943-45] Ann. Dig. 120, 121 (No. 34). "An act that violates the disciplinary rules of the sending state as well as rules of criminal law of the territorial state subjects the actor to the jurisdiction of both states." RESTATEMENT § 60, comment *h* at 190.

and on the high seas its *exclusive* jurisdiction over crimes committed within a foreign State by one of its warship's officers or crew while ashore. On the other hand, under international law a visiting State has generally no right to *exercise* such jurisdiction within a foreign State for "a state's jurisdiction to take enforcement action within its territory is normally exclusive."[74]

Under international law, however, there are a few exceptional situations wherein a territorial State is deemed to have conferred on a visiting State a limited right to exercise within its territory its -- the visiting State's -- *exclusive* jurisdiction over crimes committed within the territorial State.[75] One such situation is where a territorial State gives its consent, express or implied, for a foreign warship's officers and crew to visit ashore.

Unless the territorial State expressly indicates otherwise, international law deems that the territorial

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[74] RESTATEMENT § 20, comment *b* at 64.

[75] *Ibid*.

State impliedly confers on the visiting State a *limited* right to exercise within its territory its -- the visiting State's -- *exclusive* jurisdiction over crimes committed in whole or in part by such officers and crew while ashore.[76]

The visiting State's right to exercise within the territorial State its *exclusive* jurisdiction over crimes committed ashore by the officers and crew of one of its visiting warships is subject to the following three limitations:

(1) This jurisdiction may be exercised only on board the visiting State's warships.[77]

(2) This jurisdiction may be exercised only against members of the visiting State's armed forces.[78]

(3) This jurisdiction may be exercised to inflict only non-capital punishments if the territorial State does not provide for capital punishment in similar cases.[79]

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[76] *Cf.* RESTATEMENT § 59, at 188.

[77] Authorities cited chapter III, note 131 *supra*.

[78] Authorities cited chapter III, note 132 *supra*.

[79] Authorities cited chapter III, note 133 *supra*.

b. Crimes over which the territorial State has exclusive jurisdiction. Under international law the territorial State has the right to exercise within its territory its exclusive jurisdiction over crimes committed within its territory by the officers and crew of a visiting warship while ashore subject to one limitation: this jurisdiction may not be exercised on board a visiting warship.[80]

If the territorial State is able to arrest the offender while ashore, it can then exercise its exclusive jurisdiction over his crime. If, on the other hand, the offender regains his ship and remains on board, the territorial State may have considerable difficulty in exercising its jurisdiction. First, since "immunity from the local jurisdiction may . . . be waived,"[81] the territorial State may seek permission from the visiting warship's commander to arrest the offender, to serve him with criminal process,[82] or to

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[80] Authorities cited chapter III, notes 136, 137 supra.

[81] II HYDE § 253, at 827.

[82] Cf. Ann. v. Ministere Public, Mixed Court of Cassation, Dec. 23, 1943, 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 52 (1944-45), [1943-45] Ann. Dig. 115 (No. 33).

have him surrendered up and delivered into territorial State custody.[83] Not infrequently the territorial State requests that a suspect be surrendered for purposes of investigation and is then tempted to hold him for purposes of prosecution.[84] Such is the following case reported by Brittin and Watson:

> Recently a destroyer made a rest and recreation visit to an island which belonged to a foreign power. On this particular island there were no United States military installations nor was there any treaty or agreement regarding the exercise of criminal jurisdiction over naval personnel who might visit that island.
>
> Towards the end of the visit, an altercation occurred between crew members and a local uniformed-customs official which resulted in a general melee involving several persons. The foreign customs official was hospitalized as a result of his injuries. Shortly after the melee, local authorities requested permission to hold a line-up aboard the destroyer for the purpose of identifying United States naval participants in the fight. The commanding officer of the destroyer permitted the line-up aboard ship. The following day, local authorities requested that suspects be taken to the local hospital for another line-up before the injured customs official. The commanding officer granted permission on the understanding that all men would

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[83] Authorities cited chapter III, notes 139, 140 *supra*; *cf*. *ibid*.

[84] Orfanidis v. Ministere Public, Mixed Court of Cassation, May 31, 1943, 55 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 169 (1942-43), [1943-45] Ann. Dig. 141 (No. 38).

> be returned to the ship. At the hospital a crew member, one B, was identified and taken to the police station where he was formally arrested on a charge of assault. The destroyer subsequently departed leaving B behind for trial under the care of the American Consul.[85]

While a commanding officer may surrender a suspect to the local authorities for purposes of investigation only, the cases herein discussed emphasize that "a purely mental reservation is not equivalent even to a tacit condition"[86] on his part, that an "understanding" is not always satisfactory,[87] and that a conditional delivery and request for return -- even when reduced to writing and delivered to the local authorities -- may still not insure the suspect's timely return.[88]

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[85] BRITTIN & WATSON § 723.42, at 105.

[86] Ministere Public v. Korakis, Mixed Court of Cassation, Dec. 11, 1944, 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 66, 68, [1943-45] Ann. Dig. 120, 122 (No. 34).

[87] BRITTIN & WATSON § 723.42, at 105.

[88] Orfandis v. Ministere Public, Mixed Court of Cassation, May 31, 1943, 55 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 169 (1942-43), [1943-45] Ann. Dig. 141 (No. 38).

Where the offender has regained his ship and remains on board, a second alternative open to the territorial State is to make a diplomatic request for the offender's surrender or exercise its rights under any treaty of extradition it might have with the visiting State. Brittin and Watson, for example, discuss a case

> in which crew members of the ship were considered suspects after the ship had put to sea. The offense was possible rape and strangulation. The local authorities requested that the ship be returned to port in order to make an investigation. This request was forwarded directly to the Chief of Naval Operations by the United States Naval Attache and the commanding officer of the ship. The request was also made through diplomatic channels to the State Department. After considering all of the known elements of the case, the Chief of Naval Operations, as a matter of policy toward that particular country, directed the ship to return in order to permit the investigation to take place. . . . . At the conclusions of the investigation, local authorities determined that no members of the crew were implicated in the crime and the ship departed with all hands on board.[89]

Last, if its municipal laws permit, the territorial State may try the offender <u>in absentia</u>.

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[89] BRITTIN & WATSON § 723.42, at 106.

c. Crimes over which the visiting and territorial States have concurrent jurisdiction.

(1) Right of the visiting State. Where a territorial State gives its consent, express or implied, for a foreign warship's officers and crew to visit ashore, unless the territorial State expressly indicates otherwise, international law deems that the territorial State impliedly confers on the visiting State a limited right to exercise within its territory its -- the visiting State's -- concurrent jurisdiction over crimes committed in whole or in part by such officers and crew while ashore.

The visiting State's right to exercise its concurrent jurisdiction over crimes committed by its officers and crew while ashore is subject to the same three limitations upon its right to exercise its exclusive jurisdiction over crimes ashore. In addition, this right is also subject to the following important limitation: the territorial State has the primary right to exercise its concurrent jurisdiction over all crimes committed by such officers and crew while ashore except crimes arising out of any act or omissions done in the performance of official duty.

The visiting State may, of course, expressly or impliedly waive its primary right to exercise its

concurrent jurisdiction over crimes arising out of any act or omissions by a visiting warship's officers or crew done ashore in the performance of official duty. An implied waiver results, for example, where the visiting warship's commander unconditionally surrenders one of his officers or crew to the local authorities. The commander's failure to expressly reserve his State's *primary* right has been interpreted as an unconditional surrender of such officer or crew member.[90] It is advisable that any reservation of his State's *primary* right be immediately communicated in writing to the appropriate law enforcement and judicial authorities of the territorial State.[91] In addition, an implied waiver results where the visiting State fails to make a timely request for the surrender of an officer or crew member who has been apprehended or is being held by local authorities.[92]

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[90] *Cf.* Anne v. Ministere Public, Dec. 13, 1943, 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 52 (1944-45), [1943-45] Ann. Dig. 115 (No. 33).

[91] *Ibid*, Orfanidis v. Ministere Public, Mixed Court of Cassation, May 31, 1943, 55 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 169 (1942-43), [1943-45] Ann. Dig. 141 (No. 38).

[92] *Cf.* authorities cited chapter III, note 144 *supra*.

(2) Right of the territorial State. Under international law the territorial State has the right to exercise within its territory its concurrent jurisdiction over crimes committed in whole or in part by a visiting warship's officers and crew while ashore subject to the same limitation upon its right to exercise its exclusive jurisdiction, to wit: this jurisdiction may not be exercised on board a visiting warship. In addition, this right is also subject to the following important limitation: the visiting State has the primary right to exercise its concurrent jurisdiction over all crimes arising out of any act or omissions done in the performance of official duty by such officers and crew while ashore.

The territorial State's primary right to exercise its concurrent jurisdiction over all but "official duty" type crimes may, of course, be expressly or impliedly waived. An implied waiver results, for example, where the local authorities, having apprehended an offender over whose crime the territorial State has the primary right to exercise its concurrent jurisdiction, unconditionally delivers the offender to authorities of the visiting State. For example, "where the local authority, having arrested the offenders, surrenders them to the

commander of their ship without reservation, the courts of the flag-State recover the exercise of their jurisdiction."[93] And where the local police arrest crew members of a visiting warship for an assault committed during a cafe brawl and thereafter turn them over to the warship's shore patrol, "no notice of their arrest having been given to the commander of that ship," the visiting naval authorities "could properly claim the exercise of jurisdiction of their courts" over the crime of assault.[94]

(3) Illustrations of the rules of concurrent jurisdiction.

#1 A member of the crew of a visiting warship, while enroute from the ship to the shore in a ship's small boat to go on shore liberty, strikes and kills a fellow crew member. The visiting State has the primary right to exercise its concurrent jurisdiction over the crime.[95]

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[93] Ministere Public v. Korakis, Mixed Court of Cassation, Dec. 11, 1944, 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 66, 68, [1943-45] Ann. Dig. 120, 122 (No. 34).

[94] Id. at 68, [1943-45] Ann. Dig. at 123.

[95] Authorities cited chapter III, note 150 supra. "The rules as to ships apply to all . . . boats . . . belonging to vessels of war and detached therefrom upon any service. . . ." SNOW, INTERNATIONAL LAW § 16, at 23 (2d ed. Stockton 1898).

#2 A member of the crew of a visiting warship, while enroute from the ship to the shore in a ship's small boat to go on shore liberty, commits an *aggravated* assault upon a local launderman. The territorial State has the primary right to exercise its concurrent jurisdiction over the crime but it is probable that the local jurisdiction would recognize the disciplinary jurisdiction of the ship in this case. An implied waiver of this primary right results where the territorial State fails to request surrender of the offender.[96]

#3 A member of the crew of a visiting warship, while enroute from the ship to the shore in a ship's small boat to go on shore liberty, strikes and kills a local launderman. The territorial State has the primary right to exercise its concurrent jurisdiction over the crime.[97]

#4 A member of the crew of a visiting warship, while enroute from the ship to the shore in a local commercial water taxi to go on shore liberty, strikes and kills a fellow crew member. The territorial State has the primary right to exercise its concurrent jurisdiction over the crime but would probably

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[96] Authorities cited chapter III, note 154 *supra*. "The rules as to ships apply to all . . . boats . . . belonging to vessels of war and detached therefrom upon any service . . . ." SNOW, INTERNATIONAL LAW § 16, at 23 (2d ed. Stockton 1898).

[97] *Ibid.*

recognize the disciplinary jurisdiction of the ship in this case since the crime did not substantially affect the person or property of a local national.[98]

#5 A member of the crew of a visiting warship, while enroute from the ship to the shore in a local commercial water taxi to go on shore liberty, commits an unaggravated assault upon a local launderman. The territorial State has the primary right to exercise its concurrent jurisdiction over the crime.[99]

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[98] *E.g.*, Exemption of United States Forces, [1943] Can. Sup. Ct. 483, ______, 509, 518, [1943] 4 D.L.R. 11, ______, 33, 42 (1943), [1943-45] Ann. Dig. 124, 125, 128 (No. 36). "[W]hen the . . . men of a vessel of war are in shore boats . . . , they are under the local jurisdiction." SNOW, INTERNATIONAL LAW § 16, at 23 (2d ed. Stockton 1898).

[99] *E.g.*, Anne v. Ministere Public, Mixed Court of Cassation, Dec. 13, 1943, 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 52 (1944-45), [1943-45] Ann. Dig. 115 (No. 33), Gaitanos v. Ministere Public, Mixed Court of Cassation, June 29, 1942, 54 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 257 (1941-42), [1919-42] Ann. Dig. 169 (No. 87), Affaire Der, Court of Cassation, ______ 1868, [1868] Sirey Recueil General I. 351 (Fr.)(The Pearl), Institute of International Law, *Reglement sur le Regime des Navires de Mer et de leurs Equipages dans les Ports etrangers en Temps de Paix* (1928), art. 20, para. 1, ANNUAIRE DE L'INSTITUTE DE DROIT INTERNATIONAL 743 (1928), as translated in [1919-42] Ann. Dig. at 167. "[W]hen the . . . men of a vessel of war are in shore boats . . ., they are under the local jurisdiction." SNOW, INTERNATIONAL LAW § 16, at 23 (2d ed. Stockton 1898).

#6 A member of the crew of a visiting warship, while ashore on liberty, strikes and kills a fellow crew member during a fight on the "liberty" landing. The territorial State has the primary right to exercise its concurrent jurisdiction over the crime but would probably recognize the disciplinary jurisdiction of the ship in this case since the crime did not substantially affect the person or property of a local national.[100]

#7 A member of the crew of a visiting warship, while ashore on liberty, strikes and kills a fellow crew member during a cafe brawl which otherwise results in only nominal property damage to the cafe. The territorial State has the primary right to exercise its concurrent jurisdiction over the crime but would probably recognize the disciplinary jurisdiction of the ship in this case since the crime did not substantially affect the person or property of a local national.[101]

#8 A member of the crew of a visiting warship, while ashore on liberty, commits an unaggravated assault upon a fellow crew member during a cafe brawl which results in substantial property damage to the cafe. The territorial State has the primary right to exercise its concurrent jurisdiction over the assault of the fellow crew member.[102]

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[100] Authorities cited notes 98, 99 *supra*.

[101] *Ibid*.

[102] *Ibid*.

#9 A member of the crew of a visiting warship, while ashore on liberty, commits an unaggravated assault upon a fellow crew member during a cafe brawl which results in an injury to a waiter. The territorial State has the primary right to exercise its concurrent jurisdiction over the assault of the fellow crew member.[103]

#10 A member of the crew of a visiting warship, while ashore on liberty, commits an unaggravated assault upon a local taxi driver. The territorial State has the primary right to exercise its concurrent jurisdiction over the crime.[104]

#11 A member of the crew of a visiting warship, while ashore on liberty, wrongfully appropriates a bicycle owned by a local national. The territorial State has the primary right to exercise its concurrent jurisdiction over the crime.[105]

#12 A member of the crew of a visiting warship is given an official order by the ship's supply officer to drive the ship's jeep to the farmer's market just outside of town, requisition 500 pounds of fresh produce for the ship, and return immediately to the ship to hold an overdue inventory. After requisitioning the produce, the crew member starts back for the ship but while driving down the main road toward his ship at an excessive rate of speed he negligently strikes and kills a

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[103] Ibid.

[104] Ibid.

[105] Ibid.

local policeman. The sending State has the primary right to exercise its concurrent jurisdiction over the crime.[106]

#13 A member of the crew of a visiting warship is given an official order by the ship's supply officer to drive the ship's jeep to the farmer's market just outside of town, requisition 500 pounds of fresh produce for the ship, and return immediately to the ship to hold an overdue inventory. After requisitioning the produce, the crew member spends several hours at his favorite bar. While driving back to his ship under the influence of alcohol, he negligently strikes and kills a local policeman. The territorial State has the primary right to exercise its concurrent jurisdiction over the crime.[107]

#14 A member of the crew of a visiting warship is given an official order by the ship's supply officer to drive the ship's jeep to the farmer's market just outside of town, requisition 500 pounds of fresh produce for the ship, return to the ship by no later than midnight, and personally report to the supply officer on the success or failure of his mission. After requisitioning the produce,

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[106] NATO Status of Forces Agreement, art. VII, para. 3(a)(ii), Ministere Public v. Tsoukharis, Mixed Court of Cassation, Feb. 8, 1943, 55 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 89 (1942-43), [1943-45] Ann. Dig. 150 (No. 40), Ministere Public v. Triandafilou, Mixed Court of Cassation, June 29, 1942, 54 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 259 (1941-42), [1919-42] Ann. Dig. 165 (No. 86), Institute of International Law, *Reglement sur le Regime des Navires de Mer et de leurs Equipages dans les Ports etrangers en Temps de Paix* (1928), art. 20, para. 3, ANNUAIRE DE L'INSTITUTE DE DROIT INTERNATIONAL 743 (1928), as translated in [1919-42] Ann. Dig. at 167.

[107] *Ibid.*

the crew member spends the evening at his favorite bar. Just before midnight, while driving back to his ship under the influence of alcohol, he negligently strikes and kills a local policeman. The territorial State has the primary right to exercise its concurrent jurisdiction over the crime.[108]

#15 A member of the crew of a visiting warship, while on official duty ashore with the ship's shore patrol, negligently strikes and kills a local policeman while driving a shore patrol wagon to the scene of a reported serious accident involving the ship's jeep. The visiting State has the primary right to exercise its concurrent jurisdiction over the crime.[109]

#16 The captain of a visiting warship, while driving the ship's sedan in the course of making an official call, negligently strikes and kills a local policeman. The visiting State has the primary right to exercise its concurrent jurisdiction over the crime.[110]

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[108] NATO Status of Forces Agreement, art. VII, para. 3(a)(ii), Ministere Public v. Tsoukharis, Mixed Court of Cassation, Feb. 8, 1943, 55 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 89, ____ (1942-43), [1943-45] Ann. Dig. 150, 152 (No. 40), Institute of International Law, *Reglement sur le Regime des Navires de Mer et de leurs Equipages dans les Ports etrangers en Temps de Paix* (1928), art. 20, para. 3, ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 743 (1928), as translated in [1919-42] Ann. Dig. at 167. *Contra*, Ministere Public v. Triandafilou, Mixed Court of Cassation, June 29, 1942, 54 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 259 (1941-42), [1919-42] Ann. Dig. 165 (No. 86); another English translation appears in 39 AM. J. INT'L L. 346 (1945).

[109] Authorities cited note 106 *supra*.

[110] *Ibid*. For a discussion of official visits and other official courtesies, see I HALLECK § 23, at 144.

V. CONCLUSIONS

Eighty years ago Lord Chief Justice Cockburn, in discussing a controversial rule of criminal jurisdiction over visiting naval forces, observed:

> In whichever way the rule should be settled, so important a principle of international law ought not to be permitted to remain in its present unsettled state.

Unfortunately, as Colombos observes, some of the rules of criminal jurisdiction in this area are still "not quite free from doubt." In an effort to resolve some of this doubt, this study has sought to define the respective rights under international law of visiting and territorial States to exercise their exclusive and concurrent jurisdiction over crimes committed on board visiting warships or committed by a visiting warship's officers or crew while ashore.

Why have the rules defining these rights remained for so long in an "unsettled state"? First, there appears to be only a modest amount of interest in international legal problems sounding in criminal law. The example, Professors McDougal and Burke, in their recent monumental work on the contemporary law of the sea,[1] while discussing

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[1] McDOUGAL & BURKE, THE PUBLIC ORDER OF THE OCEANS (1962)

the immunities of a visiting warship and its crew, give relatively little consideration to the very real and highly controversial conflicts of criminal jurisdiction that can and have arisen during the visits of warships in foreign ports.[2]

Second, when attention has been given to the rules of criminal jurisdiction over visiting naval forces, these rules have usually been stated in broad, imprecise terms. For example, the rules proposed in 1898 and 1928 by the Institute of International Law were devoid of such needful terms as "jurisdiction," "concurrent," and "exercise." McDougal and Burke were hardly more precise as to shipboard crimes when they merely commented:

> [S]tates are in complete agreement that the coastal state is without authority to intervene with respect to conduct aboard warships in internal waters without the consent of the flag-State. If the coastal state acquires custody of the accused, as by surrender from the flag authorities, prescription and application of coastal law is, of course, permissible.[3]

What is needed, of course, is not an oversimplification and a specific retrospect based on the facts and decisions in *Chung Chi Cheung v. The King* but rather precise legal

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[2] *Id.* at 170-71.

[3] *Id.* at 170.

concepts and a well designed conceptual framework which can be studied and evaluated today against that future day certain when a *Ministere Public v. Barleycorn* will come before the local Tribunal de Police Correctionnel in Freedomport, Lower Volta. That time, not now, is the real "moment of truth." As Lord Atkin said:

> [I]n accordance with the conventions of international law, the territorial sovereign grants to . . . public ships and naval forces carried by such ships, certain immunities. Some are well settled; others are uncertain. When the local Court is faced with a case where such immunities come into question, it has to decide whether in the particular case the immunity exists or not. If it is clear that it does, the Court will of its own initiative give effect to it.

On the other hand, if it is *not* clear that it does, the court should be amenable to the reasoned application of accepted legal concepts within a framework constructed on currently valid precedents and principles.

Over the last 150 years legal concepts long generally accepted by lawyers and judges have been utilized with increasing frequency and precision to resolve international conflicts in this general area. In *The Schooner Exchange* the concepts of implied waiver of jurisdiction and of immunity from jurisdiction were applied to international litigants. In *Chung Chi Cheung v. The King* the concepts of concurrent jurisdiction and of the waiver of an immunity from jurisdiction were approved. In concepts and [illegible] and [illegible] any [illegible] among [illegible] [illegible] tual [illegible]

> [illegible]

On the other hand, [illegible]

[illegible]

Ministere Public v. Korakis, the controversy was evaluated as a conflict of jurisdiction. In *Anne v. Ministere* the inquiry was as to the limits imposed by international law upon the exercise by one State of its concurrent jurisdiction. In the NATO Status of Forces Agreement the drafters utilized the concept of a "primary right" to exercise concurrent criminal jurisdiction. And in the American Law Institute's proposed restatement on "The Foreign Relations Law of the United States" the use of the concept of "secondary jurisdiction" -- more properly a secondary right to exercise concurrent jurisdiction over a crime -- is being recommended. All of these concepts are but legal corollaries of Marshall's doctrine of implied immunities, a basic principle which does not determine whether or not a particular immunity from local jurisdiction is actually accorded to a visiting State by international law but rather how such an immunity comes to be accorded and what are its legal consequences and implications.

In closing, it is hoped that the illustrations at the end of chapters III and IV, together with the conceptual framework in which they have been placed, will eventually prove to be of some value in clarifying the status under international law of a number of the immunities from local criminal jurisdiction accorded to visiting naval forces. If this hope is realized, this study will then have achieved its ultimate purpose.

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